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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-423

PUYALLUP TRIBE, INC.,
and
RAMONA BENNETT,

Petitioners,

v.

DEPARTMENT OF GAME OF
THE STATE OF WASHINGTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF WASHINGTON

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OCTOBER TERM 1976
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PUYALLUP TRIBE, INC., and RAMONA BENNETT, Petitioners,

v.

THE DEPARTMENT OF GAME, et al., Respondents.

PETITION FOR A WRIT
OF CERTIORARI TO THE
SUPREME COURT OF WASHINGTON

Petitioner respectfully prays that a writ of certiorari issue to review one aspect of the judgment of the Supreme Court of Washington entered in the above-entitled case, upon denial of a motion for rehearing, on June 25, 1976.

Opinions Below

The opinion of the Supreme Court of Washington, Appendix B infra, is reported

in _____ Wn.2d _____, 548 P.2d 1058 (1976). The Memorandum Decision, Findings and Conclusions and the Order and Judgment of the Superior Court for Pierce County, the Honorable William L. Brown, Jr., entered on December 23, 1974, and April 8, 1975, Appendices C through E, are unreported.

Jurisdictional Grounds

The judgment of the Supreme Court of Washington (App. B) became final, upon denial of motion for rehearing by a vote of seven to one, on 25 June 1976. (App. B-67). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1970).

Question Presented

Whether, consistently with established principles of tribal immunity, a state court may adjudicate on-reservation treaty fishing rights of an Indian tribe and allocate the catch among tribal and non-tribal fishermen.

Treaties and Statutes Involved

The treaties and statutes involved are set forth in Appendix A.

Statement of the Case

This case arrives in this Court for

the third time during its thirteen-year history. It was initiated originally by the Washington Departments of Game and Fisheries in the Superior Court for Pierce County against the tribe and certain named individuals seeking to enjoin alleged violations of state fishing laws. On certiorari here for the first time, this Court, viewing the case as one involving state power to regulate off-reservation fishing (391 U.S. at 396 n.11), ruled that a state prohibition against Indian net fishing could be sustained only as "a reasonable and necessary" conservation measure. Puyallup Tribe v. Department of Game (Puyallup I), 391 U.S. 392, 403 (1968). The Court pointed out that on remand "any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the [treaty] phrase 'in common with.'" Id.

On remand, the Department of Game assumed what the trial court called an "adamant" posture that Indians had no rights other than those of non-Indian citizens. The trial court denied injunctive relief on conservation grounds, ruling that the Game Department "had failed to give any consideration to Indian Treaty fishing rights as decreed by the Supreme Court." Memorandum Opinion of Rummel, J., November 24, 1970, Pierce County Superior Court. On appeal, the

Washington Supreme Court upheld as reasonable a 1970 Fisheries Department regulation allowing limited Indian net fishing for coho salmon on the Puyallup River and a 1970 Game Department regulation precluding all Indian net fishing for steelhead. Department of Game v. Puyallup Tribe, 80 Wn.2d 561, 497 P.2d 171 (1972). On certiorari for a second time, this Court held that the Department of Game's 1970 total prohibition against Indian net fishing for steelhead on the Puyallup was an invalid "discrimination" because "all Indian net fishing is barred and only hook and line fishing, entirely preempted by non-Indians, is allowed." Department of Game v. Puyallup Tribe (Puyallup II), 414 U.S. 44, 48 (1973). The order of remand from this Court led to the first state authorized Indian net fishery for steelhead on the Puyallup River during the 1973-74 winter season, more than ten years after the initiation of the action, and more than five years after this Court made clear that state closures of off-reservation Indian fisheries must be justified by conservation needs.

Two federal adjudications, to which both the Department of Game and the Puyallup Tribe are parties, intervened some months before the instant case came on for its third trial. In February and March of 1974, Senior District Judge George H. Boldt of the Western District of Washington, in

the exercise of his continuing jurisdiction over virtually all aspects of treaty fishing rights of more than 20 tribes in the region, entered a series of rulings affecting a wide range of issues—including tribal self-regulation, allocation of anadromous fish resources among treaty and nontreaty fishermen, and the power of the state to restrict off-reservation fishing for conservation purposes. United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 96 S.Ct. 877 (1976). On the single issue of the inclusion of hatchery steelhead in computing off-reservation Indian rights on the Puyallup River, Judge Boldt initially deferred to the state courts,[1] although he has since refused to accord preclusive effect to the Washington Supreme Court decision on the natural-hatchery distinction and has twice ruled that the state lacks

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[1]"Discharge of [the responsibility to distinguish between native and propagated steelhead] appears to be within the jurisdiction of this court by issues all parties have submitted. . .However, under the Puyallup II mandate to the State Supreme Court it appears appropriate to this court that the state courts hear and determine the matter referred to, at least in the first instance." 384 F.Supp. at 344-45.

the power to regulate on-reservation Indian fishing.[2] The second federal adjudication before the latest trial of the instant case occurred in May 1974. The Ninth Circuit Court of Appeals entered a ruling in a separate lawsuit initiated by the United States on behalf of the Puyallup Tribe against the state seeking a declaration "that the Puyallup Indian Tribe and its authorized representatives have exclusive right to, and regulation of, all fishing on or in the Puyallup River within the Puyallup Indian Reservation."[3] The complaint prayed for injunctive relief enjoining the state defendants from exercising jurisdiction over and interfering with Indian fishing within reservation boundaries. Before the Ninth Circuit, the state challenged "the continued existence of the Puyallup Indian Reservation and, as a consequence, the right of the Puyallup Tribe of Indians to fish, free from State interference, on the part of the Puyallup River lying within the Reservation." United States v. Washington, 496 F.2d 620 (9th Cir. 1974). The court rejected this claim and held that the reservation "continues to exist." Id. at 621. Certiorari was denied. 419 U.S. 1032 (1974).

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[2] Order of October 22, 1975; Order of Aug. 13, 1976.

[3] Complaint, Civ. No. 39-71 (W.D. Wash.).

The instant case was tried for the third time in the Pierce County Superior Court in June of 1974. On January 9, 1974, in an amended pleading, the Department of Game had sought a declaration that it possessed the sole authority to regulate the taking of steelhead by the Puyallup Tribe on the Puyallup River. Complaints in intervention filed by two sportsmen's groups, Northwest Steelheaders Council of Trout Unlimited and the Western Steelheaders, Inc., made claims that sports fishermen were entitled to all hatchery steelhead in the Puyallup River by reason of contributions to the hatchery program represented by sportsmen's license fees and excise taxes.

By answer, filed on May 23, 1974, by motion for continuance filed before trial, at the trial (ST. 1-12), by motion for reconsideration and by proposed findings and conclusions (Defendants' Proposed Findings and Conclusions 24-25), the tribe asserted that the intervening decision of the Ninth Circuit confirming the existence of the Puyallup Reservation mooted the remand because of the lack of state power to regulate on-reservation fishing. By these same procedural mechanisms, the tribe continuously asserted its sovereign immunity. Undisputed testimony at trial establishes that the tribal steelhead fishery occurs almost exclusively on the river within the exterior boundaries of the reservation. (ST. 773-74). The trial

court acknowledged the Ninth Circuit's ruling that the Puyallup reservation "had not been terminated and extinguished,"[4] found that the tribe's intention is to take 90 to 100 percent of all its future steelhead harvest within the reservation boundaries (FF XVIII, App. D - 17), averred that "the extent of [the treaty] right within the boundary of the former Puyallup Indian Reservation is not now before this court" (CL IV, App. D - 20), but then concluded that treaty rights, even when exercised on-reservation, permitted the taking of no hatchery fish whatsoever and no more than 45 percent of the harvestable natural run. By the court's computation this came to an annual tribal catch of 3,310 fish[5] or perhaps 3,280 fish.[6] The trial court assumed a continuing jurisdiction to regulate the on-reservation steelhead fishery for purposes of both conservation and allocation, and ordered the tribe to file with the court an authenticated roll

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[4] FF XVI, App. D 16-17. In his Memorandum Decision (App. C - 37), however, the trial court concluded that an earlier state court opinion that the Puyallup Reservation no longer exists was "the law of this case."

[5] FF XXII, App. D 19.

[6] Order and Judgment, App. E 3.

of authorized fishermen and weekly catch reports during the steelhead season. FF VIII, App. D - 11; FF XXI, App. D - 18; CL VII, App. D - 21; Order and Judgment, App. E 3-4. While this case was sub judice before the Washington Supreme Court, during last winter's steelhead season the trial court exercised its continuing jurisdiction over the on-reservation fishery and entered a temporary restraining order against further treaty fishing on a finding that the tribe "has exceeded its treaty entitlement of 2,866 steelhead for the 1975-76 winter steelhead run." Order of February 3, 1976. On February 6, 1976, the trial court entered another order directing the Puyallup Tribe, through its officers, to enact a closure of tribal steelhead fishing and to enforce it. This was followed, on February 27, 1976, by a judgment of contempt reiterating the closure directive and directing the Department of Game to take on-reservation enforcement action.

Proof at trial during June of 1974, established that the tribe has regulated its fisheries for a number of years by regular enactment of ordinances, and openings and closures. (ST. 762-73, 777, 779, 801, 803-05, 900, 905, 924-25; Exh. 74-P, 74-Q). Indeed, the regulation enacted by the Game Department approving a tribal steelhead fishery for the 1973-74 season following this Court's decision in

Puyallup II borrowed heavily from existing tribal ordinances. (ST. 802). The tribe now fishes under the auspices of the federal court decision of Judge Boldt, which calls for information exchanges among parties and the filing of tribal and state fishing regulations with the court. See 384 F.Supp. at 420. Overall, there are 20 full time tribal fishermen, 20 more who fish on a part time basis, and 20 others who fish occasionally but rely heavily on different runs for support (ST. 758-60; FF XV, App. D - 16). The 20 full time fishermen support not only themselves but also another 10 families. (ST. 759). As many as 150 members of the tribe are supported by these year round fishing activities. (ST. 759). The income of tribal members is low, and is heavily dependent upon fishing opportunities. (ST. 760-61). The tribe itself has approximately 850 members according to figures of the Bureau of Indian Affairs (ST. 755), and is governed by a council. (ST. 754). The chairperson of the tribe, Ms. Ramona Bennett, is a member of the council (ST. 755) and testified at trial. Biological expertise for tribal management of its fisheries is provided by the Northwest Indian Fisheries Program of the United States Fish and Wildlife Service, whose director at the time, Mr. James Heckman, testified at trial. (ST. 671-753, 960-1063). The chief witness for the Game Department described the 1973-74 Puyallup

River tribal steelhead fishery as "rather orderly." (ST. 1103-04). The tribal net fishery, by all accounts, is accomplished without trespassing on private lands. The Puyallup fisherman anchor their set nets to bridges and employ small boats to place their drift nets. (See ST. 486-87, 805). The actual steelhead catch by tribal fisherman for the 1973-74 season was estimated by Mr. Heckman to be approximately 1,900 fish (ST. 971-72), although the Department of Game put the figure at approximately 3,000 (ST. 1103). In any event, the tribal catch did not exceed the 3,300 fish allocation ordered initially by the trial court. (FF XXII, App. D - 19; Order and Judgment, App. E - 3).

Proof at trial dwelt mostly on the respective sizes of natural and hatchery steelhead runs in the Puyallup River, the funding origins of the hatchery plants, the interrelationships between hatchery and natural fish, and the reliability of methods for distinguishing between the two. Factual representatives made to this Court during argument in Puyallup II[7] are

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[7] 414 U.S. at 48:

> At oral argument counsel for the Department of Game represented the catch of steelhead that were developed from the hatchery program were

revised substantially by the present record: the size of the natural run, assumed to approximate 5,000-6,000 fish during the second appeal of this case, see 80 Wn.2d at 572-73, 497 P.2d at 178-79, was fixed by the trial court at 14,715 fish (FF XII, App. D 14-15), in light of estimates extracted from the Game Department of a combined natural-hatchery run of 56,000 fish (Exh. 74-U; see ST. 1065-67). The size of the hatchery steelhead run was found to represent not 60 or 80 percent of the total run but only 50 percent. (FF XI, App. D - 14). The state game fund supports approximately two thirds of the operating costs of the Game Department's steelhead program. (ST. 144-46). Hunting and fishing license fees account for 75 to 80 percent of the operating funds of the Department of Game (FF IV, App. D 19-10) about half coming from hunting licenses and half from licenses relating to fishing. (See ST. 164, 232). Steelhead fishermen account for approximately 25 percent of the funds attributable to fishing licenses; stated

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in one year 60% of the total run and in another 80%. And he stated that approximately 80% of the catch of that program was financed by license fees of sports fishermen.

another way, steelheaders account for 10 percent of the entire Game Fund. (ST. 164, 240-41). On a capital investment basis, the principal witness for the Department of Game testified, the replacement value of the Department's steelhead hatchery program facilities is $33 million, three-fourths of which is accounted for by federal and mitigation money compensating for fisheries resources destroyed by hydroelectric and other projects. (ST. 133-37). If forced to rely on state funding alone, the Department would be able to produce only slightly in excess of 1 million of the current annual steelhead production of 5 million smolts (FF IX, App. D - 12; ST. 404-06).

Evidence offered by the tribe was circumscribed sharply by evidentiary rulings of the trial court, although the case was tried without a jury. Testimony and exhibits offered to show extensive federal funding of western Washington hatchery facilities and smolts was excluded on objection of the Department and sportsmen's groups. (ST. 324, 328, 702-03, 717, 736-40, 744, 990-1004; Exhs. 74-C, 74-K, 74-M). Similar rulings were made to exclude evidence on matters outside the Puyallup River watershed (ST. 324, 572, 702-03, 878, 990-1004), and evidence dealing with competition for survival between hatchery and natural steelhead (ST. 328-31; Ex 74-E, 74-F).

Most importantly, testimony and exhibits dealing with environmental degradation of the Puyallup watershed, offered to show widespread adverse effects on the spawning and rearing of naturally produced steelhead, was excluded repeatedly on objection of the Department and sportsmen's groups (ST. 668-69, 683-94, 720-25). This severely impacted on the tribe's contention that any treatment of hatchery fish for purposes of the treaty cannot be divorced from a consideration of the erosion of the rights associated with the advances of civilization. Despite these adverse rulings, there is evidence in the record documenting severe environmental abuses affecting adversely the watershed and its anadromous fish populations. (ST. 124-28; 260-64; 726-31).

Rulings Below

Throughout the trial and in several post trial submissions, the petitioners, defendants below, argued the issues raised here of lack of state power to regulate fishing on-reservation and tribal sovereign immunity. (See page 7, supra). These contentions were rejected by the trial court (Memorandum Decision, App. C - 51; Findings and Conclusions, CL I, App. D - 19, CL VII, App. D - 21; Order and Judgment, App. E - 3) and by the state Supreme Court (_____ Wn.2d at _____, 548 P.2d at 1063, 1069, 1074, App. D 5-8,

27, 43).

In the opinion of the Supreme Court of Washington, tribal sovereign immunity and on-reservation jurisdictional objections were without merit for two reasons: first, the court read this Court's rejection of sovereign immunity claims in Puyallup I (391 U.S. at 396 n.11) as still controlling because the case was analogized to "a suit to enjoin violations of state law by individual tribal members fishing off the reservation." _____Wn.2d at _____, 548 P.2d at 1063, App. B - 6. Second, the court read the remand in Puyallup II as mandating an allocation of the entire steelhead run, and enforcement of that allocation by state authorities without regard to reservation boundaries. Id. at _____, 548 P.2d at 1063, App B - 6. On the issue of the treaty applicability to hatchery fish, the prevailing opinion assigns three reasons for denying an Indian entitlement: first, the court found it "inconceivable," in view of the "inexhaustible" supply of fish at treaty times, that the parties "intended the Treaty to create any rights beyond the natural run." Id. at _____, 548 P.2d at 1071, App. B - 31. Second, the court read the shellfish proviso[8] to the treaty "right of taking fish"

[8] "Provided, however, That they shall not take shellfish from any beds staked or cultivated by citizens, and that they

as suggesting "that the rights secured to the tribe under the treaty did not encompass artificially propagated sources of fish." Id. at _____, 548 P.2d at 1071, App. B 33-34. Third, the court grounded exclusion of the hatchery fish from the scope of the treaty right on a "consideration of equity" said to be supported by the fact "that the steelhead program conducted by the State Department of Game is nearly totally funded by the citizens of the state, primarily via license and other 'user fees.'" Id. at _____, 548 P.2d at 1071-72, App. B - 6 (footnote omitted). This was described as a "subsidy" to the Indian fishery, supported by reference to the concurring opinion of Mr. Justice White in Puyallup II. 414 U.S. at 49-50. The disposition of the state Supreme Court, with one important qualification, was to affirm the judgment of the trial court in all respects. The qualification took the form of a direction to the Department of Game to determine annually the size of the natural steelhead run on the Puyallup River and the number of fish represented by the tribe's share (45 percent), and to enforce that allocation. _____ Wn.2d at _____, 548 P.2d at 1073-

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shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter." 10 Stat. 1133, App. A - 2.

74, App. B 41, 44.

Chief Justice Stafford joined by three other justices concurred in the result on the ground that Puyallup II mandated an apportionment between treaty and nontreaty fishermen of the entire steelhead run. "At first blush," Chief Justice Stafford wrote, "it would appear that the State lacks the necessary power to enforce the equitable apportionment directed by the United States Supreme Court," citing such cases as Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) and Menominee Tribe v. United States, 391 U.S. 404 (1968). But Chief Justice Stafford assumed nonetheless that Puyallup II must be read as repudiating sub silentio this line of authority: "If the Supreme Court had not recognized the existence of a State power to control and supervise the mandated allocation, the Supreme Court's direction would, for all practical purposes, be impossible to establish, implement, and enforce." _____ Wn.2d at _____, 548 P.2d at 1075, App. B 46-48.

Justice Rosellini concurring in part and dissenting in part, reasoned that the Treaty of Medicine Creek could not have reserved an exclusive right to fish and control fishing on-reservation, pointing out that such a right is reserved with specificity in the Walla-Walla Treaty. Id. at _____, 548 P.2d at 1077, App. B 55-56. He would find a denial of equal

protection to other citizens in any treaty right that gives Indians superior rights.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Washington encroaches severely upon federally protected rights indispensable to the livelihood of the members of the Puyallup and other tribes. Ironically, it has transformed this Court's reversal in Puyallup II of the Game Department's consistent refusal to recognize Indian rights into an instrument for eroding these rights still further by summary use of state powers. If the judgment stands, its impact will be severe -- not only upon the Puyallup fishery essential to sustenance of tribal members but on tribal self-regulation and the integrity of control over other on-reservation tribal affairs. The issues call for determination and consideration by this Court.

I.

First: The decision of the court below is in conflict with the decision of this Court in Puyallup I and II and other decisions of this Court and the lower federal courts permitting restrictions upon any Indian fishery only upon a strict showing of conservation necessity. The State "must demonstrate that its regulation

is a reasonable and necessary conservation measure . . ., and that its application to the Indians is necessary in the interest of conservation." Antoine v. Washington, 420 U.S. 194, 207 (1975) (emphasis in original), citing Department of Game v. Puyallup Tribe (Puyallup II), 414 U.S. 44 (1973); Tulee v. Washington, 315 U.S. 681, 684 (1942). The decision below authorizes the Game Department to determine annually the number of fish represented by the allocation (45 percent of the natural run), and to enforce that allocation by a closure on-reservation without regard to conservation necessity. This is exactly what happened only last winter while this case was pending before the Washington Supreme Court. The trial court chose to exercise its continuing jurisdiction, recompute downwards the tribal share (from 3,310 fish to 2,866 fish) and order an on-reservation closure without a colorable conservation justification (p. 9, supra). The decision below approving this practice would be wrong were it applied to an off-reservation fishery, and is twice wrong because it is applied to an on-reservation fishery.

Second: By holding that state authorities may regulate tribal fishing on the reservation, the court below contradicts settled principles of Indian law going back to the early days of the Republic.

The concurring opinion of Chief Justice Stafford concede the problem by acknowledging that"it would appear that the State lacks the necessary power to enforce the equitable apportionment directed by the United States Supreme Court." _____ Wn.2d at _____, 548 P.2d at 1075, App. B 46-47, citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) and Menominee Tribe v. United States, 391 U.S. 404 (1968), among other authorities.

By reading Puyallup II as discarding this unbroken line of precedent, the state Supreme Court departed from well established principles protecting the authority of an Indian tribe to regulate the conduct of its members free from state interference. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832), of course makes clear that the tribes are recognized as "distinct, independent, political communities" qualified to exercise powers of self-government "not by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignity." F. Cohen, Handbook of Federal Indian Law 122 (1942). This principle has survived in decisions of this Court through Ex Parte Crow Dog, 109 U.S. 556 (1883), holding that tribal courts alone had jurisdiction over the murder on-reservation of one Sioux Indian by another, and Williams v. Lee, 358 U.S. 217 (1959), forbidding the exercise of

state court jurisdiction over a suit by a non-Indian to collect on a debt incurred on-reservation, to McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973), barring the imposition of a state income tax on earnings of Indians derived from on-reservation activities. Whether the theory be one of tribal sovereign immunity or federal preemption by treaties and statutes, see id. at 172, the question to ask, according to Williams v. Lee, is whether the particular state initiative "infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 220. Only last term this Court applied the teaching of Williams v. Lee and similar cases to foreclose state court jurisdiction over an Indian adoption proceeding where the parties resided on-reservation and the conduct occurred there. Fisher v. District Court, 96 S.Ct. 943, 946 (1976). See also Seymour v. Superintendent, 368 U.S. 351 (1962).

That the exercise of state power here at issue encroaches heavily on the Indians' right "to make their own laws and be ruled by them" is, we submit, overwhelmingly clear. The state courts have asserted nothing short of a power to nullify tribal regulation of the single activity that is indispensable to the economic well being of the membership and their traditional

values. It is difficult to conceive of an intervention in tribal self-government more demeaning and decisive than an order to its governing body to enact and enforce an ordinance curtailing the memberships' chief economic activity. This is not a tax on income earned, as was condemned in McLanahan, but a ban on earning income. The court below has approved the exercise of a continuing jurisdiction, replete with administrative details, that places the practical governance of an important tribal fishery in the hands of state officials whose hostility has been clearly recorded. See United States v. Washington, 520 F.2d 676, 693 (9th Cir. 1975), cert. denied, 96 S.Ct. 877 (1976) (Burns, J., concurring) (recalcitrance of state officials, and vocal commercial and sports fishermen produced denial of Indian rights requiring intervention by federal district court).

Not only can the Game Department point to no federal statutory authority justifying this unprecedented encroachment over a tribal fishery, the legislation that can be found points the other way. The well known Public Law 280, 67 Stat. 588 (1953), 18 U.S.C. § 1162 (1970), App. A 2-3, granting certain states jurisdiction over some offenses committed by or against Indians in "Indian Country," contains an exclusion that hardly could be

more specific:

> Nothing in this section. . .shall deprive any Indian or any Indian tribe, band, or community of any right, privilege or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

By inviting state authorities to close fisheries on the reservation, the decision below flatly offends 18 U.S.C. § 1162, not to mention a local variation of the same proposition, R.C.W.A. § 37.12.060 (1964), and a host of federal court decisions. Only last year the Ninth Circuit read the Treaty of Medicine Creek as confirming a proposition now contradicted by the decision below:

> The right to take fish in common with the settlers off the reservations was a right reserved by the Indians in addition to their right to occupy and use reservation land. The settlers obtained no analogous rights on the

> reservations. Other citizens clearly have no more claim to a share of the fish caught on the reservations than they do to a right to reside on these reservations. The court thus did not abuse its discretion in excluding fish caught on the reservations from the apportionment.

520 F.2d at 690.

The judgment below, by authorizing state control over an on-reservation fishery, conflicts either with direct holdings or considered dicta of an unbroken line of authority, including decisions of this Court, Menominee Tribe v. United States, 391 U.S. 404, 411 n.12 (1968) ("the exercise of rights on reservation lands guaranteed to the tribe by the Federal Government would not be subject to state regulation, at least in absence of a cession by Congress "); Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) (affirming restraint against non-Indian encroachment upon reservation fisheries); decisions of the lower federal courts, Kimball v. Callahan, 493 F.2d 564, 568 (9th Cir.), cert. denied, 419 U.S. 1094 (1974) (although the former reservation lands in question were "no longer legally occupied by the Klamaths"); Moore v. United States, 157 F.2d 760 (9th Cir.),

cert. denied, 330 U.S. 827 (1946); Mason v. Sams, 5 F.2d 255 (W.D. Wash. 1925); Quechan Tribe v. Rowe, 350 F.Supp. 106 (S.D. Cal. 1972); Leech Lake Band of Chippewa Indians v. Herbst, 334 F.Supp. 1001 (D. Minn. 1971); Klamath & Modoc Tribes v. Maison, 139 F.Supp. 634 (D. Ore. 1956), modified, 338 F.2d 620 (9th Cir. 1964); United States ex rel. Lynn v. Hamilton, 233 Fed. 685 (W.D. N.Y. 1915); In re Lincoln, 129 Fed. 247 (N.D. Cal. 1904); In re Blackbird, 109 Fed. 139 (W.D. Wis. 1901); Oneida Tribe of Indians v. United States, 165 Ct. Cl. 487, cert. denied, 379 U.S. 946 (1964); and of the state courts, Donahue v. California Justice Court, 15 Cal. App. 3d 557, 93 Cal. Rptr. 310 (1971), cert. denied, 404 U.S. 990 (1971).

In Mattz v. Arnett, 412 U.S. 481, 506 (1973), this Court held that the Klamath Indian Reservation had not been terminated by Act of Congress and therefore remained "Indian Country" for purposes of 18 U.S.C. § 1151. The Court pointed out, however, that it was deciding nothing regarding the existence of Mattz' fishing rights or the application of California law notwithstanding the reservation status, 412 U.S. at 485, although on remand the state court applied the general rule foreclosing state jurisdiction over on-reservation fishing. Arnett v. Five Gill Nets, 48 Cal. App. 3d

454, 461-62, 121 Cal. Rptr. 906, 911-12 (1975), cert. denied, 96 S.Ct. 1500 (1976). In the instant case the court below, mistakenly we believe, read this Court's remand in Mattz as making state jurisdiction over on-reservation fishing an "open question," ____ Wn.2d at _____, 548 P.2d at 1063, App. B - 7, then proceeded to resolve it against the tribe. The decision thus misreads Mattz, misconstrues the scope of the remand in Puyallup II, and contradicts other basic principles of Indian law. All are sufficient reasons to require correction here.

Third: By ruling that tribal fishing rights extended to none of the hatchery fish and less than half of the harvestable natural steelhead run, the Washington Supreme Court effectively extinguished tribal community fishing rights in more than three-fourth's of the harvestable steelhead in the river. By doing so and by going further to authorize a continuing administrative authority over tribal fishermen and catch, the court grossly exceeded its jurisdiction and offended principles of tribal sovereign immunity that are firmly established, misapplying in the process this Court's decision in Puyallup I.

The tribe's objection on this point was thought by the Washington Supreme Court, _____Wn.2d at _____, 548 P.2d at 1063,

App. B - 6, to be answered fully by the ruling of this Court in Puyallup I where sovereign immunity objections were answered as follows: "This case, however, is a suit to enjoin violations of state law by individual tribal members fishing off the reservation. As such, it is analogous to prosecution of individual Indians for crimes committed off reservation lands, a matter for which there has been no grant of exclusive jurisdiction to federal courts." 391 U.S. at 396 n.11.

The Washington Supreme Court, we believe, has misread this narrow rejection of sovereign immunity claims in the early phases of this litigation to make the tribe a virtual prisoner in the state courts, answerable to any claims regarding fishing that happen to be asserted by the state or by any intervenor. A number of factors combine to contradict this reading of Puyallup I: first, the Ninth Circuit's decision confirming the existence of the reservation has transformed this litigation from what was presumed to be an off-reservation case to what is known to be an on-reservation case.[9] Second,

[9] This Court always has understand Puyallup I to be applicable only to off-reservation activity. See Mescalero Apache Tribe v. Jones, 411 U.S. 145, 149 (1973).

the instant case presents not even a colorable claim of a violation of state law. Allegations of violence during the fishery were included in the Department's amended pleading but were repudiated by a Department witness at trial (ST. 1104-05) and are wholly unsubstantiated by the record. No conservation justification is offered either for excluding hatchery fish from the treaty or for allocating the natural run. What the court below has done, purely and simply, is to resolve basic issues of treaty rights adversely to the tribe over continuing jurisdictional and sovereign immunity objections. Third, the analogue of the prosecution of individual Indians is exploded thoroughly by a recognition that what has been accomplished is to exempt a substantial segment of the steelhead in the river from the terms of the federal treaty.

Under these circumstances, the decision below conflicts with firmly established principles extending to the tribe an immunity coextensive with that available to the United States. E.g., United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940); Namekagon Development Co. v. Bois Forte Reservation Housing Authority, 517 F.2d 508 (8th Cir. 1975); Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F.2d 1231 (4th Cir. 1974). If tribal sovereign immunity operates to bar a suit against a tribe for negligence

claims growing out of the operation of a bridge on-reservation, Haile v. Saunooke, 246 F.2d 293 (4th Cir.), cert. denied, 355 U.S. 893 (1957), or of a tribal resort, Morgan v. Colorado River Indian Tribe, 103 Ariz. 425, 443 P.2d 421 (1968), or of the conduct of an election, Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967), then one wonders why it does not preclude a lawsuit that strikes heavily at the income of tribal fishermen by curtailing their opportunities to make a living. Indeed, were a state agency to file suit against the tribe tomorrow in the Pierce County Superior Court, State of Washington, seeking an allocation, let us say, of the Puyallup River coho salmon run, we believe the suit would be subject to summary dismissal on sovereign immunity grounds. The result should not be different where, as here, an action initiated thirteen years ago gradually evolves into an attempted adjudication of tribal community fishing rights.

Fourth: The decision of the court below is in clear conflict with the decision of the Ninth Circuit confirming the existence of the Puyallup Reservation, United States v. Washington, 496 F.2d 620 (9th Cir.), cert. denied, 419 U.S. 1032 (1974), and of Judge Boldt's decisions also affirmed by the Ninth Circuit, allocating the Indian and non-Indian catch. United States v.

Washington, 384 F.Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 96 S.Ct. 877 (1976). The Ninth Circuit decision, holding that the reservation still exists, a fortiori resolves the question of the tribe's exclusive power to regulate the fishing of its members on-reservation. That the issues are one and the same was conceded by state authorities in the continuing litigation before Judge Boldt,[10] and for all practical purposes thirty years ago before this Court. Tulee v. Washington, 315 U.S. 681, 683 (1942). By holding that state regulation may ensue despite reservation status, the tribe's long awaited success in winning judicial recognition of the reservation is rendered a nullity. The decision below also contradicts, sometimes purposely so, several aspects of Judge Boldt's decisions, including those permitting the tribe to fish under its own regulations properly filed in the federal court, those allocating the Puyallup River steelhead fishery on a 50-50 basis[11] among the tribal and sports fisheries, and those barring on-reservation enforcement powers.

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10 "An exclusive right of fishing was reserved by the tribes within. . .their reservations. This proposition is not denied or challenged by any party in this case." 384 F.Supp. at 332 & n.12. See id. at 341.

11 Id. at 343-45 (spelling out the allocation formula).

The state court judgment asserts under a slightly different rationale the conclusion that the Puyallup Reservation does not exist, and thus repeats again a holding that already has prompted this Court once to enter a summary reversal. Satiacum v. Washington, 414 U.S. 1 (1973) (per curiam) (on the ground, however, that a federal question had been decided unnecessarily). By allowing the Game Department to relitigate questions of power over Indian fishing on-reservation, previously resolved by litigation in the federal courts, the decision not only creates a conflict requiring review before this Court but also offends basic principles of collateral estoppel. City of Tacoma v. Taxpayers, 357 U.S. 320 (1958). This separate ground, alone and in combination with the others, is reason enough for granting the writ.

II.

For the reasons stated above, we believe the Washington Supreme Court erred in reading Puyallup II as approving, without regard to reservation status, the assumption by the state courts of a power to decide the question of treaty entitlement to hatchery fish, allocate the natural run and enforce the allocation on-reservation. On the merits of the treaty applicability to hatchery steelhead, we believe the decision below to be equally wrong.

It represents, in our view, a fundamental misreading of the language and purposes of the treaty, a misunderstanding of the relevance of sources of funding to the scope of a federally protected fishing right, and a rule that is unworkable in fact. The decision was made, moreover, on a record improperly curtailed, particularly as regards evidence of environmental degradation of the Puyallup watershed. We do not seek certiorari on this second issue, however, for the reason that the tribe has an adequate remedy available to it. On August 13, 1976, the Honorable George H. Boldt of the United States District Court, Western District of Washington, entered an order clarifying his intention to proceed to trial on certain environmental claims of all western Washington tribes and on the claims of all tribes to an entitlement to hatchery stock included in all anadromous fish runs. The separate tribes, including the Puyallup Tribe, the United States, and state authorities are parties to that proceeding. For this reason, the tribe is not at this time seeking certiorari on the second issue of treaty applicability to hatchery fish.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition

for a writ of certiorari should be granted to review the question of state court jurisdiction to adjudicate on-reservation Indian fishing.

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APPENDIX A

Treaty and Statutory Provisions Involved

Treaty of Medicine Creek
10 Stat. 1132 (1854)

* * * *

ARTICLE II. There is, however reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: . . . . all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant.

If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: Provided, however, That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

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18 U.S.C. §1162. State jurisdiction over offenses committed by or against Indians in the Indian Country.

* * * *

(b) Nothing in this section shall . . . . deprive any Indian or any Indian

tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

APPENDIX B

IN THE SUPREME COURT

OF THE

STATE OF WASHINGTON

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,	)	
Respondent,	)	
NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED and GARY ELLIS,	)	NO. 43736
Intervenor-Respondents,	)	EN BANC
WESTERN STEELHEADERS, INC.,	)	
Intervenor-Respondents,	)	
v.	)	
PUYALLUP TRIBE, INC., et al.,	)	
Appellants.	)	Filed APR 8 1973

HUNTER, ASSOCIATE JUSTICE

The appellants (defendants), the Puyallup Tribe and Ramona Bennett, the Tribal Council chairwoman,[1] appeal from a decision of the Superior Court for Pierce County, which determined the extent of their right to commercially fish for steelhead. The Washington State Department of Game has also appealed from certain aspects of the trial court's decision.

This case does not involve a conflict of recent origin. Rather, the initial litigation commenced in 1963. Since that time, we have written two decisions, both of which have been reviewed by the United States Supreme Court. In order to place the present case in proper perspective, we shall initially set forth the nature of the issues previously raised and the decisions rendered.

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[1] As we have pointed out twice before, "[t]he case caption is erroneous, there being no entity known as 'The Puyallup Tribe, Inc., a corporation.' The Puyallup Tribe of Indians did appear and answer by and through the chairman of the Tribal Council." Department of Game v. Puyallup Tribe, Inc., 70 Wn.2d 245, 247 n.1, 422 P.2d 754, 755 (1967), quoted in Department of Game v. Puyallup Tribe, Inc., 80 Wn.2d 561, 563 n.1, 497 P.2d 171 (1972).

In Department of Game v. Puyallup Tribe, Inc., 70 Wn.2d 245, 422 P.2d 754 (1967), we recognized that the Puyallup Tribe still existed and that its members enjoyed certain fishing rights under the Treaty of Medicine Creek. Furthermore, we held that these rights could only be limited through statute or regulations to the extent reasonably necessary for the conservation of the fishery. On review, the United States Supreme Court affirmed our decision. It held that while the rights secured by the treaty extended to off-reservation fishing, nevertheless "the manner of fishing, the size of take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." Puyallup Tribe v. Department of Game, 391 U.S. 392, 398, 20 L. Ed. 2d 689, 88 S. Ct. 1725, 1728 (1967) (hereinafter cited as Puyallup I). However, that Court remanded the case for a determination of the issue of whether the total bar against the use of set nets in freshwater streams or at their mouths was a reasonable and necessary conservation measure. In response to this decision, the Department of Fisheries, charged with the duty of regulating the salmon fishery, changed its regulations to allow a net fishery for salmon in those areas of

the Puyallup River not utilized for spawning.

On the other hand, the Department of Game, which is the governing agency with regard to steelhead, refused to pass a similar regulation and continued to prohibit all net fishing for steelhead trout. In an appeal to this Court, we held that the regulations passed by the Department of Fisheries were reasonable and consistent with the necessary conservation standards. Department of Game v. Puyallup Tribe, Inc., 80 Wn.2d 561, 497 P.2d 171 (1972). In regard to steelhead, we stated that while the Indians may have a right to a net fishery, nevertheless the steelhead run was not of sufficient size to withstand a commercial net fishery for that year. On review, the United States Supreme Court held that a total ban on net fishing would discriminate against the Indians, since the steelhead fishery was totally preempted by the hook and line, non-Indian sport fishermen. Washington Game Dept. v. Puyallup Tribe, 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973) (hereinafter cited as Puyallup II). That Court remanded the case for a determination of the percentage of the run which had to be allowed to escape in order to perpetuate the species, and the number of catchable fish which had to be apportioned to an Indian commercial net

fishery. In a concurring opinion, three Justices noted that the majority opinion applied only to the natural run of steelhead.

On remand, the Superior Court for Pierce County held that the fishing rights afforded under the treaty did not extend to the hatchery run, the one-half of the natural run had to be allowed to escape in order to perpetuate the species, and that the Indians were entitled to catch 45 percent of the remaining one-half of the natural run. The Puyallup Tribe has appealed from the trial court's decision in its entirety. The State Department of Game has appeled from that portion of the decision which determined the size of the total natural run and the apportionment of 45 percent of the catchable fish to the tribe.

At the outset it seems appropriate to discuss the jurisdictional aspects of this case. Appellants have contended all along that the state courts do not have jurisdiction in this matter because issues pertaining to federal treaty rights are exclusively federal matters. We believe this contention is without merit for two reasons. First, in this case the State is concerned with a matter that is clearly within its jurisdiction--it is seeking to determine the extent to

which it can apply its sovereign power to regulate resources for the purpose of conservation. See Puyallup I at 398-400. In order to do so, it is necessary to determine the extent to which Indians may be exempt from state regulations because of overriding federal treaty rights. See State ex rel. Campbell v. Case, 182 Wash. 334, 341, 47 P.2d 24 (1935). In this posture, the case is analogous to "a suit to enjoin violations of state law by individual tribal members fishing off the reservation," a situation clearly within state jurisdiction. See Puyallup I at 397 n.11.

Second, a more importantly, jurisdiction is proper because the United States Supreme Court specifically remanded this case for a determination of a fair allocation that "accommodate[s] the rights of Indians under the Treaty and the rights of other people." See Puyallup II at 49. We view Puyallup II as expressly conferring jurisdiction in this matter in the state courts.

It has also been contended that the recently established, continuing existence of the Puyallup Indian Reservation, see United States v. State of Washington, 496 F.2d 620 (9th Cir. 1974), cert. denied, 419 U.S. 1032 (1974), precludes any state jurisdiction over activities

occurring within the reservation boundaries. We believe that this is at most simply not the case, and at least an open question after Mattz v. Arnett, 412 U.S. 481, 485, 37 L. Ed. 2d 92, 93 S. Ct. 2245 (1972). In addition, the Supreme Court's clear mandate in Puyallup II would seem to include on-reservation state jurisdiction. In order to control the escapement necessary for the conservation of the species, it is inescapable, given the geography in this case, that the State must be able to control on-reservation fishing activities. State regulation of on-reservation fishing is mandated by, and consistent with, the Supreme Court's view of Indian treaty rights as presented in Puyallup II at 49:

> We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival.

> The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.

Finally, any suggestion that this Court should defer to the United States District Court of Western Washington, in light of its continuing jurisdiction in a similar fishing matter, on grounds of comity, is not well taken. The present case was remanded by the Supreme Court to the state courts before that federal action was even started. There is no reason we should defer to the subsequently commenced, ongoing litigation in that federal court.

Therefore, we conclude that our jurisdiction is proper. Furthermore, as will be indicated later in the opinion, continuing jurisdiction over the Indians' steelhead fishery must be exercised by the State Department of Game.

Before considering the issues raised by the appellants and cross-appellants, an analysis of the United States Supreme

Court's decision in Puyallup II is essential. Reading Puyallup II in context with Puyallup I, we feel that the issue of whether the Treaty of Medicine Creek gives the Indians a right to a commercial net fishery is at least an open question. In Puyallup II, the United States Supreme Court stated on page 48: "Our prior decision recognized that net fishing by these Indians for commerical purposes was covered by the Treaty. 391 U.S., at 398-399." However, as demonstrated below, the language of Puyallup I does not bear this out. In Puyallup I, the United States Supreme Court made the following statement of page 398:

> The treaty right is in terms the right to fish "at all usual and accustomed places." We assume that fishing by nets was customary at the time of the Treaty; and we also assume that there were commercial aspects to that fishing as there are at present. But the manner in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty. We would have quite a

different case if the Treaty had preserved the right to fish at the "usual and accustomed places" in the "usual and accustomed" manner. But the Treaty is silent as to the mode or modes of fishing that are guaranteed. Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one "in common with all citizens of the Territory." Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State. The right to fish "at all usual and accustomed" places may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States. Act of June 2, 1924, 43 Stat.

253, as superseded by § 201(b) of the Nationality Act of 1940, 8 U. S. C. § 1401(a)(2). But the manner of fishing, the size of the take, the restriction of commercial fishing, and the life may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.

In the final paragraph of the Puyallup I opinion, the Supreme Court drew the following conclusion on pages 401-03:

> Whether the prohibition of the use of set nets in these fresh waters was a "reasonable and necessary" (70 Wash. 2d, at 261, 422 P.2d, at 764) conservation measure was left for determination by the trial court when the Supreme Court, deeming the injunction in No. 247 too broad,

remanded the case for further findings. When the case was argued here, much was said about the pros and the cons of that issue. Since the state court has given us no authoritative answer to the question, we leave it unanswered and only add that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase "in common with."

(Footnotes omitted.) Therefore, it certainly appears that the United States Supreme Court in Puyallup I declined to interpret the Medicine Creek Treaty with regard to the Indians' right to a net fishery. We recognized this in our second decision, Department of Game v. Puyallup Tribe, Inc., 80 Wn.2d 561, 497 P.2d 171 (1972), when we stated on page 568:

> [T]here can no longer be any question that whatever the United States Supreme Court may ultimately construe to be

> the Indian rights to fish under the Medicine Creek Treaty, they are subject to the reach of the state powers and regulations necessary to the conservation of the fishery, providing the regulations are not discriminatory against the Indians.

(Italics ours.)

In addition, it is important to place our decision in the above cases in the correct perspective. The controlling issue there was the validity of regulations enacted by the Department of Fisheries and the Department of Game. The Department of Fisheries' regulations allowed an Indian net fishery in the Puyallup River for salmon, subject to certain limitations for conservation purposes. The Department of Game regulations prohibited a net fishery for steelhead. Our decision was designed to determine the reasonableness of regulations and not to interpret the Treaty itself. It was unnecessary to decide whether the Department of Game was required to pass a regulation allowing a net fishery for steelhead. Consequently, we overstated our case by indicating that an Indian net fishery was a matter of right under the

Treaty. To the extent that our decision lends itself to this interpretation, it is hereby overruled.

Considering the present appeal in this posture, we now direct our analysis to the interpretation of the Treaty of Medicine Creek that we deem to be correct. We feel that an interpretation is necessary as an initial matter in order to arrive at an allocation of steelhead in the Puyallup River that is consistent with and takes into account Indians rights under the Treaty. Those rights must be determined before they can be given effect.

If the Treaty of Medicine Creek, December 26, 1854 (10 Stat. 1132), provides the Puyallup Indians with any fishing right at all beyond those possessed by ordinary citizens, the provision that does so is article 3 (10 Stat. 1133). See Puyallup I at 394-95, n.1. The pertinent language of article 3 is the following:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory. . .

(Italics ours.) It is the interpretation of this Treaty language that is crucial to any determination of Indian fishing rights. As with any Indian treaty, of course, certain long-standing and often stated rules of construction govern this very significant interpretation.

The rules of interpretation applicable to Indian treaties have been variously stated. Basically, treaties are to be interpreted in accord with the intent of the parties. So far as possible, the sense in which the Indians understood the treaties rather than a technical legal meaning should be given effect. Choctaw Nation v. Oklahoma, 397 U.S. 620, 631, 25 L. Ed. 2d 615, 90 S. Ct. 1328 (1970); Choctaw Indians v. United States, 318 U.S. 423, 432, 87 L. Ed. 877, 63 S. Ct. 672 (1943); United States v. Shoshone Tribe, 304 U. S. 111, 116, 82 L. Ed. 1213, 58 S. Ct. 794 (1938); Starr v. Long Jim, 227 U.S. 613, 623, 57 L. Ed. 670, 33 S. Ct. 358 (1913), quoting Jones v. Meehan, 175 U.S. 1, 11, 44 L. Ed. 49, 20 S. Ct. 1 (1899); United States v. Winans, 198 U.S. 371, 49 L. Ed. 1089, 25 S. Ct. 662 (1905); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 581, 8 L. Ed. 483 (1832). The United States Supreme Court stated this principle in Tulee v. Washington, 315 U.S. 681, 684, 86 L. Ed. 1115, 62 S. Ct. 862 (1942), as follows:

> It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

Another recognized rule of construction requires that the language in treaties and statutes ratifying agreements with the Indians be construed liberally in favor of the Indians and never to their prejudice. Antoine v. Washington, 420 U.S. 194, 199, _____ L. Ed. 2d _____, ___ S. Ct. ____ (1975); Choctaw Indians v. United States, supra at 431; Worcester v. Georgia, supra. Likewise, any ambiguities or "doubtful expressions" are to be resolved in favor of the Indians. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973), quoting Carpenter v. Shaw, 280 U.S. 363, 367, 74 L. Ed. 478, 50 S. Ct. 121 (1930); Choctaw Nation v. Oklahoma, supra; Winters v. United States,

207 U.S. 564, 576, 52 L. Ed. 340, 28 S. Ct. 207 (1908).

These canons of construction, however, are not without their limitations. With regard to the rule that resolves ambiguities in favor of the Indians, the United States Supreme Court recently stated in DeCoteau v. District County Court, 420 U.S. 425, 447, _____ L. Ed. 2d _____, ____ S. Ct. ____ (1975), as follows:

> We give this rule the broadest possible scope, but it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes. A cannon of construction is not a license to disregard clear expressions of tribal and congressional intent.

(Italics ours.) Similar limitations apply to all the liberal rules of construction mentioned above. First, the attempt as an initial matter, to prefer the Indians' understanding of a treaty does not mean that their alleged understanding must prevail. "[E]ven Indian treaties cannot be rewritten or expanded

beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." Choctaw Indians v. United States, supra at 432. See Skokomish Indian Tribe v. France, 320 F.2d 205, 207 (9th Cir. 1963). The United States Supreme Court has also stated that

> [w]e attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress.

(Footnote omitted.) Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 353, 89 L. Ed. 985, 65 S. Ct. 690 (1945).

Second, the Supreme Court has said that it cannot "under the guise of interpretation, create presidential authority where there was none, nor rewrite congressional acts so as to make them mean something they obviously were not intended to mean." Confederated Bands of Ute Indians v. United States, 330 U.S. 169, 179, 91 L. Ed. 823, 67 S. Ct. 650 (1947).

Indian rights cannot be determined "under any acceptable rule of interpretations" merely because the Indians thought the right existed. Confederated Bands of Ute Indians on page 180. Hence, if the language in an Indian treaty is clear and unambiguous, then the courts cannot interpret the treaty in a way that will expand or go beyond the rights that are plainly set out by the treaty.

As heretofore stated, the important language to be construed in article 3 of the Treaty of Medicine Creek is "[t]he right of taking fish. . .is further secured to said Indians, in common with all citizens of the Territory." The meaning of this clause is clear and unambiguous on its face. Its plain meaning has significance and confers a distinct benefit. However, interpretation of the Treaty requires us to construe and give meaning to the phrase "in common with."

The general meaning of "common" has changed very little since the Treaty of Medicine Creek was written. Compare N. Webster, An American Dictionary of the English Language 231 (1862), and A Dictionary of American English 575 (W. Craige ed. 1936) with Webster's Third New International Dictionary (1961). The basic definition of "common" is not complicated. "Common" means "of or relating to a

community at large (as a family unit, social group, tribe, political organization, or alliance) . . ." It therefore seems obvious that this treaty provision simply means that the Indians share in common, that is, share equally, with other citizens the opportunity to take fish. This Treaty provision requires that as to their "accustomed grounds and stations" the Indians must not be denied the right to fish to the same extent as all other citizens of the state. State regulations governing fishing resources must treat Indians no better or worse than other citizens.

The United States Supreme Court seemed to recognize this interpretation when it said in the last paragraph of Puyallup I, on page 403, "that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with.'" History also supports the view that the intent of the parties, as is clear from the provision's language, was to preserve equal treatment for the Indians.

There were absolutely no limitations on anyone, Indian or non-Indian, as to the steelhead or salmon harvest until the last part of the nineteenth century. See Uncommon Controversy: Fishing Rights

of the Muckleshoot, Puyallup, and Nisqually Indians 61-62 (A Report Prepared for the American Friends Service Comm.) (U. W. Press 1970); Johnson, The States Versus Indian off-Reservation Fishing: A United States Supreme Court Error, 47 Wash. L. Rev. 207, 213-14 (1972).[2] This

[2] Up to 1921, the regulation of the fisheries that did occur was undertaken directly by the state legislature without technical help. The regulations reflected no more than a cursory knowledge of conservation requirements and consisted of limited time closures and increasingly stricter limitations on fixed gear. J. Crutchfield & G. Pontecorvo, The Pacific Salmon Fisheries 131-32 (1969). See, e.g., Laws of 1899, ch. 117, §§ 1 and 2, p. 194-95; Laws of 1897, ch. 82, §§ 1-3, p. 214-16. See also State v. Allen, 80 Wash. 83, 141 P. 292 (1914).

The use of the most effective methods of catching fish, e.g., fixed appliances such as fish traps and setnets, was not completely prohibited until 1935. Laws of 1935, ch. 1, § 8, p. 6. This prohibition was the result not of legislative action but of an initiative measure which was approved at the general election on November 6, 1934. Moreover, it was not until 1947 that the steelhead species was classified as a game fish and thus became

fact clearly indicates that at the time of the Treaty in 1854, the parties did not contemplate the event of conservation requirements necessary to preserve the species. There was an inexhaustible supply of fish, see Uncommon Controversy, supra at 4 n.3, 61-62, and the Treaty was undoubtedly premised on this condition. Consequently, it is inconceivable that the parties to the Treaty contemplated an allocation of the fish or an advantage of one over the other in the manner of taking fish. The fish were there for the taking. It was important only for the Indians to enjoy the right of taking fish in common with, i.e., on an equal basis with, the citizens of the territory. This is exactly what the parties must have intended. It is what the language of article 3 plainly provides in addition to assuring the Indians access to certain geographical fishing areas.

Our interpretation of article 3 means that Indians under treaties concerning fishing rights "in common with all citizens" are, to the same extent as

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note 2 con't.
subject to the special regulations enforced by the Department of Game. See Laws of 1947, ch. 275, § 10, p. 1200.

other citizens, subject to state conservation regulations that meet appropriate standards. See Puyallup I at 398-99. However, the Indians' Treaty right to fish "at all usual and accustomed grounds and stations" cannot be qualified by the state. See Antoine v. Washington, supra at 206-07; Puyallup I at 398; United States v. Winans, supra at 381, 384. Thus the Treaty language guarantees the Indians access to their usual and accustomed fishing grounds. This right of access cannot be contravened by the state even in the exercise of its police power for the conservation of fish as a natural resource. But the state can, for the purposes of conservation, properly regulate the public's right to fish and such regulations are applicable equally to Indians and non-Indians.

The United States Supreme Court's treatment of similar language in other Indian treaties is consistent with the above analysis. For instance, the Court stated in United States v. Winans, supra at 381, that the right of taking fish at all usual and accustomed places

> was a right outside of those boundaries [the reservation] reserved "in common with the citizens of the Territory."

> As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise.

The Court further stated that this right does not "restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised." United States v. Winans, supra at 384.

Other Supreme Court treatments of this problem recognize more explicitly the equal regulation aspect. In New York ex rel. Kennedy v. Becker, 241 U.S. 556, 563, 60 L. Ed. 1166, 36 S. Ct. 705 (1916), which, as against Indians claiming a treaty right, upheld a state regulation prohibiting spear fishing, the Supreme Court justified the result as follows:

> Rather are we of the opinion that the [treaty] clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in

> common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State . . .

(Italics ours.)

In Tulee v. Washington, supra at 685, the Supreme Court held that a state regulation requiring license fees for fishing could not be applied to Indians because "such exaction of fees as a prerequisite to the enjoyment of fishing in the 'usual and accustomed places' cannot be reconciled with a fair construction of the treaty." However, the Supreme Court did clearly recognize the State's right to regulate for conservation when it stated earlier in the opinion on page 684, that

> the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of

> fishing outside the reservation as are necessary for the conservation of fish . . .

(Footnote omitted.)

Further support for the interpretation presented above -- that the Indians share equally, i.e., in common with other citizens, the public right to fish and, in addition, are guaranteed access to certain fishing locations -- is found in Seufert Bros. Co. v. United States, 249 U. S. 194, 63 L. Ed. 555, 39 S. Ct. 203 (1919). This case is particularly relevant because it involved article 3 of the Treaty with the Yakimas, June 9, 1855 (12 Stat. 25). That provision is nearly idential to article 3 of the Treaty of Medicine Creek. The two treaties were entered into contemporaneously. See 249 U.S. at 196. The Supreme Court interpreted the treaty language as follows:

> How the Indians understood this proviso we are considering is not doubtful. During all the years since the treaty was signed they have been accustomed habitually to resort for fishing to the places to which the decree of the

> lower court applies, and they have shared such places with Indians of other tribes from the south side of the river and with white men. This shows clearly that their understanding of the treaty was that they had the right to resort to these fishing grounds and make use of them in common with other citizens of the United States,--and this is the extent of the right that is secured to them by the decree [injunction] we are asked to revise.

Seufert Bros. Co. v. United States, supra at 198-99. See Puyallup I at 399.

We conclude therefore that a proper interpretation of the Treaty of Medicine Creek permits the state to promulgate conservation regulations meeting appropriate standards that affect all citizens, Indian and non-Indian, equally. However, such regulations cannot deny the Indians access to their usual and accustomed fishing places, nor can they restrain Indian fishing at those places except to the extent the regulations restrain the fishing

rights of all state citizens, e.g., regulations as to time and manner of fishing, size of catch, etc.

It should be noted that this interpretation of the Treaty grants to the Indians certain rights that they otherwise would not clearly have retained at the time. In addition to guaranteeing access to certain fishing locations, article 3 of the Treaty put them on an equal footing with "all citizens of the Territory." Admittedly, such equal treatment would be superfluous today--it would give the Indians no additional rights beyond those that they already possess. But at the time of the Treaty, equal footing with citizens of the Territory was very significant. When the Treaty was written Indians were not citizens and, in addition, some of the normal methods of obtaining citizenship were not open to them. See F. Cohen's Handbook of Federal Indian Law 154 (1971). Article 3 served a definite purpose because it assured the Indians that they would have a right to uninhibited access to their usual and accustomed fishing grounds. This guarantee was not unimportant in the context of a government policy designed to restrict the Indians to residence on the reservations as much as possible in order to avoid conflict between the Indians and the settlers. See E. Swindwell, Report

on Source, Nature, and Extent of the Fishing, Hunting and Miscellaneous Related Rights of Certain Indian Tribes in Washington and Oregon 55, 58-59 (Department of the Interior, 1942); Uncommon Controversy, supra at 41-42; Coan, The Adoption of the Reservation Policy in Pacific Northwest 1853-1855, 23 Oregon Historical Quarterly 1, 12, 14 (1922). Consequently, the interpretation above, which means the Indians were assured equal treatment at the time of the Treaty (plus the absolute right of access to certain locations), does not mean that the Indians were merely given something that they would have had even without the Treaty. Cf. United States v. Winans, supra at 380.

Certain Treaty rights may now be nugatory due to subsequent events, that is, they are now enjoyed by the Indians simply because they are citizens of the United States. This does not mean, however, that a court in the context of interpretation can expand and rewrite a treaty beyond its clear meaning at the time it was entered into. See Choctaw Indians v. United States, supra. The Treaty of Medicine Creek clearly provided for significant rights at the time it was concluded. The Treaty cannot now be expanded beyond its unambiguous terms even if some of those terms have been superseded, thus making the Treaty arguably

unjust. See Northwestern Bands of Shoshone Indians v. United States, supra.

Because the Treaty, as well as the equal protection guarantees to the Constitution, demands that the Indians receive equal treatment, it is uncontroverted that any state regulation of fishing may not discriminate, that is, the regulations must apply equally to all citizens whether Indian or non-Indian. See Puyallup I at 398, 403; cf. New York ex rel. Kennedy v. Becker, supra at 562. In the absence of an overriding federal treaty right granting the Indians a right to fish for steelhead trout with nets, state regulations allowing Indians to fish with nets while denying that manner of fishing to other citizens would be discriminatory and, hence, improper. Cf. State ex rel. Campbell v. Case, 182 Wash. 334, 341, 47 P.2d 24 (1935). Equal protection is denied when similarly situated persons, e.g., all state citizens including Indians, are treated differently by allowing only a certain class of fish with nets. See Truax v. Corrigan, 257 U.S. 312, 334, 66 L. Ed. 254, 42 S. Ct. 124 (1921); State ex rel. Bacich v. Huse, 187 Wash. 75, 80, 59 P.2d 1101 (1936). Thus there would be no discrimination if all net fishing, including Indian net fishing, were prohibited. There is also no discrimination where all state

citizens are only allowed to fish by a certain method, e.g., by hook and line. Illegal discrimination would occur only where one group is given special rights that the other group is denied, e.g., allowing only Indians to net fish or allowing only non-Indians to fish with hook and line. See Thomson v. Dana, 52 F.2d 759, 764 (D.C. Ore. 1931), aff'd per curiam, 285 U.S. 529, 76 L. Ed. 925, 52 S. Ct. 409 (1932); State v. Hals, 90 Wash. 540, 542-43, 156 P. 395 (1916); Barker v. State Fish Comm'n, 88 Wash. 73, 76-77, 152 P. 537 (1915).

Therefore, in the absence of special federal rights, state regulations permitting only one group to utilize a certain fishing method would be discriminatory and in violation both of constitutional equal protection guarantees and the straightforward language of the Treaty of Medicine Creek. Consequently, we hold that the manner of fishing permitted by any regulation for the conservation of the fishery must apply the same to Indians as to non-Indians. For example, if the prohibition of net fishing is necessary for the preservation of the fishery, it must be equally applied both to Indians and non-Indians in order to come within the ambit of the equal protection clause of the United States Constitution and the "equal protection" implication of

article 3 of the Treaty of Medicine Creek.

As previously mentioned, we feel that the juxaposition of Puyallup II beside Puyallup I demonstrates that the interpretation of the Treaty of Medicine Creek is an open question. For this reason, we have rendered the decision above as the first phase of our opinion. We recognize that the ultimate disposition of the treaty interpretation question is, however, vested with the United States Supreme Court. Moreover, we feel constrained by the express language on the face of Puyallup II, when considered independent of Puyallup I, to defer to the statement in Puyallup II, recognizing an Indian right to a net fishery. Therefore, pending an ultimate disposition of this issue by the United States Supreme Court, we will follow Puyallup II and undertake a consideration of the allocation question expressly called for by that case. We must determine two issues. First, does the Indian Treaty right to a net fishery encompass only the natural run of steelhead, or does it extend to both the natural run and the hatchery run? Second, in terms of number of fish, how extensive is the right, and by what agency should this allocation be implemented? We shall address ourselves to these issues in the above order.

The artificial propagation of steelhead through a hatchery program on the Puyallup River did not commence until 1933. Therefore, just as the inexhaustible supply of fish at the time of the Treaty makes it inconceivable that the parties contemplated controls and limits on the fishery, it is also inconceivable that either the tribe or the government intended the Treaty to create any rights beyond the natural run. However, by examining the Treaty itself, we do find evidence which specifically relates to this issue. Even though the Treaty obviously makes no reference to artificially propagated steelhead, which were unknown at the time, it does set forth Indian rights with regard to artificially cultivated shellfish. There is an explicit proviso in article 3 that follows the language securing "the right of taking fish." The proviso states "[t]hat they [the Indians] shall not take shellfish from any beds staked or cultivated by citizens . . ." Treaty of Medicine Creek, (10 Stat. 1132, 1133). This plain language demonstrates that the rights secured to the tribe under the Treaty did not encompass artificially propagated sources of fish. Likewise, the Supreme Court indicated in Puyallup II that this result is correct. The majority opinion made no comment at all on the issue, but the concurring opinion of Mr. Justice White

stated that "the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen." Puyallup II at 49.

We can find no reason to distinguish artificially cultivated shellfish from hatchery bred steelhead since the impact of the Treaty is to distinguish natural sources from artificial sources. To interpret the Treaty in any other fashion requires this Court to literally rewrite the terms of the Treaty and this we cannot do. See Confederated Bands of Ute Indians v. United States, supra; Northwestern Bands of Shoshone Indians v. United States, supra; and Choctaw Indians v. United States, supra.

The appellants contend that the opposite result must obtain due to changed circumstances such as civilization and pollution which are claimed to have caused depletion of the natural run. We disagree. The Treaty itself does not vest the Indians with any right in hatchery bred steelhead. Furthermore, the record does not demonstrate that the run has been depleted, but instead establishes that the artificially propagated run in fact augments the natural run since a hatchery bred steelhead loses it distinguishing characteristics upon returning to its native stream and henceforth is

classified as a natural run steelhead. Mr. Millenbach, the Chief of the Fisheries Management Division, testified as follows:

> Q. Now, does the Department of Game at no cost to the members of the Puyallup Tribe provide any services which enhance the Puyallup Tribe fishery? A. Well, the hatchery planting of smolt steelhead have contributed substantially to the net catch in the Puyallup River--the Indian net catch.

Mr. Heckman, who was called as an expert witness by the appellants and is a fishery biologist in charge of the Northwest Fisheries program, concurred in this opinion. The State thus established that the size of the natural run is increased yearly at no expense to the tribe. On the other hand, the appellants failed to introduce any evidence which substantiated their claim that the size of the natural run has in fact been depleted by the effect of modern society and, if so, the extent thereof. In conclusion, the appellants' contention that changed circumstances justify the sanctioning of a net fishery for hatchery bred steelhead

cannot be justified by the Treaty and is not supported by the record. Consequently, their argument must fail.

This result, which excludes hatchery bred fish from the Treaty right, is further supported by consideration of equity. The evidence below demonstrated that the steelhead prgram conducted by the State Department of Game is nearly totally funded by the citizens of the state, primarily via license and other "user fees."[3] It would be manifestly unfair to give one group of citizens a superior opportunity to enjoy a resource thusly provided while

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[3] The record clearly establishes that approximately 75 percent of the Department of Game's total revenue is derived from license fees. Moreover, only 4 percent of the total statewide expenditures by the Department of Game for the steelhead program are federally derived and this amount is attributable to matching funds under the Federal Anadromous Fish Act. It is our opinion, furthermore, that even if the State Department of Game's programs were totally federally funded, the Indians, absent specific conditions on such federal financing, would enjoy only those rights available to all state citizens to the resources thus provided.

denying other citizens, who provide the necessary funding, equal treatment. To allow the Indians to take hatchery fish by the use of nets would be subsidize them to the extent that other state citizens are paying for the hatchery program, while being limited solely to the much less effective hook-and-line method of fishing.[4] The Indian Treaty does not demand such a subsidy. See Puyallup II at 49 (White, J. concurring).

We hold therefore that the Puyallup Indians have no rights in the hatchery run of steelhead other than those enjoyed by all citizens of the state. To hold otherwise would be to put the State to a Hobson's choice: either to continue the hatchery program and thus provide the Indians with additional steelhead guaranteed to be caught in their nets; or, to discontinue the program altogether and thus deny the benefits of such a resource program to all citizens of the state. Our holding in no way discriminates against the Indians because they, like all other citizens, are still free, as they always have been, to catch hatchery fish by the hook-and-line method as provided

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[4] We take judicial notice of the fact that one is far more likely to catch fish through the utilization of a net than with hook and line.

under the regulations of the State Department of Game.

We now direct our attention to the final issue. How many actual fish must be made available for that net fishery, and in what manner should this allocation be implemented?

The trial court decision below was, quite simply, an attempt to follow the Supreme Court's mandate in Puyallup II. The Supreme Court stated that the harvestable number of steelhead

> must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned. . . .
>
> The aim is to accommodate the rights of Indians under the Treaty and the rights of other people.

(Italics ours.) Puyallup II at 48-49.

In order to do this, the trial court first determined, as we have, that the Indians' treaty right does not extend

to hatchery fish. It then found that the total steelhead run in the Puyallup River is composed of hatchery and natural fish in equal proportions, i.e., half the run is of natural origin and half is of hatchery origin. This finding is amply supported by the record. The record also supports the trial court's finding that a 50 percent escapement factor is required for the propagation of the natural run. Fifty percent of the natural run must be allowed to spawn in order to preserve the species. The trial court thus determined, in effect, that half the total annual steelhead run was natural and that it would be consistent with conservation (escapement) requirements to harvest half of the natural run.

After making the above determinations, the trial court then disposed of the main issue--the ultimate allocation between an Indian net fishery based on the Treaty and the sports fishery. Based on equitable factors, the trial court found that giving the Puyallup Treaty Indians 45 percent of the annual, natural steelhead run available for harvest would be a fair apportionment of the resource. Using estimates of the annual natural run size based on evidence relating to past steelhead runs, the trial court translated this percentage share into an exact number of fish, provided that the annual

run size continued to be of the same magnitude as the run size estimates before the court.

We believe that 45 percent of the harvestable natural run was equitable determination by the trial court in the exercise of its discretion. We cannot say from this record that such a determination was a manifest abuse of discretion. We therefore are not disposed to disturb this holding of the trial court. See Granite Equip. Leasing Corp. v. Hutton, 84 Wn.2d 320, 328, 525 P.2d 223 (1974); State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The number of fish resulting from this apportionment will probably vary, of course, from year to year depending on the size of the natural run. The evidence in the record does not clearly establish a constant annual natural run size. On the contrary, the record indicates that the run size varies from year to year. The available estimates ranged from about 4,000 in the natural run to 56,000 in the total run. It is therefore obvious that the effect of this allocation decision will be determined each year by the size of the natural run. Thus it is necessary to decide who should be charged with the duty to make this annual allocation determination.

The Department of Game is the expert state agency charged with the duty of conserve the state's game resources, including the steelhead trout. See RCW 77.12.010,.040. The Supreme Court recognized in Puyallup II on page 48, that conservation decisions must be made by an expert. "Only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species."

The 45 percent allocation figure of this decision applies to the harvestable amount of the annual, natural steelhead run, i.e., the amount available after conservation requirements are met. This allocation will necessarily depend on the Department of Game's estimate of the natural run size each year and its annual approximations as to the harvestable number of fish in the natural run. The Department's annual determination of the harvestable number of fish in the natural run, that is, its determination of the escapement requirement calculated to assure preservation of the species, will therefore determine the extent of the Indian net fishery required by federal treaty. Forty-five percent of the harvestable natural run is the extent of this treaty right. The Department of Game's annual determination will actually yield the number of fish that the Indians can catch using nets pursuant to the treaty

rights that, for purposes of this part of our opinion, we have assumed to exist.

By thus transforming the Indian right to a net fishery into an actual number of fish, it is possible to recognize this Indian Treaty right in light of conservation requirements and in the context of the total annual steelhead run. The total run consists of both hatchery and natural origin steelhead, while the treaty right only applies to the natural fish. It is possible to differentiate the two types of fish by certain markings, but they are substantially identical in size and all other characteristics. In practical terms there is no way to assure that only natural fish will be caught in the Indian nets.

All of the hatchery fish are harvestable because their escapement is not required to preserve the natural run. Thus, if the Indians take annually the actual number of their Treaty fish, the rest of the harvestable natural run, plus the rest of the hatchery run, will still be available to the sports fishery.[5] This

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[5] We emphasize again that the sports fishery is available to all state citizens--Indians are not preempted or precluded from participating in the hook-and-line fishery. The record shows that

method allocates the fish available, in light of conservation requirements, between the Indians' net fishery and the sports fishery--it assures that the Indian Treaty right is recognized.

To summarize, in phase one of the opinion, we hold that the Puyallup Tribe's right to a net fishery under the Treaty of Medicine Creek has never been directly adjudicated. It is our belief that the Treaty language "in common with" does not require that the Indians be exempted from State regulations. Rather, all that the Treaty requires is that the regulations apply equally to Indians and non-Indians. Because we feel bound to follow the express language on the face of Puyallup II, under phase two of our opinion, we hold that allocating 45 percent of the harvestable natural steelhead run each year to the Indian Treaty net fishery is a fair apportionment between Indian net fishing and sports fishing. The Department of Game has the responsibility to determine the extent of the harvestable natural run and to accommodate this

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Puyallup Indians have in fact fished in this manner. Indians enjoy the right to sports fishery on an equal basis with other citizens except that they are not required to purchase either a license or a punch card.

apportionment when establishing annual conservation regulations.

The judgment of the trial court is affirmed, except as to the modification thereof, wherein we direct the Department of Game to implement the annual allocation of steelhead consistent with this opinion. The first phase of our opinion is held in abeyance pending a final disposition of the Treaty interpretation issue by the United States Supreme Court, at which time a reversal of the trial court decision, consistent with the first phase of this opinion, may be necessary.

/s/ Hunter, J.

WE CONCUR:

/s/ Wright, J.

/s/ Hamilton, J.

No. 43736

STAFFORD, C. J. (Concurring in the Result) -- I concur in the result reached by the majority as well as with the allocation of the steelhead trout run between the Indians and non-Indians. However, I reach the same result for different reasons.

I have reviewed Puyallup Tribe v. Department of Game, 391 U.S. 392, 20 L. Ed. 2d 689, 88 S. Ct. 1725 (1967) (hereinafter called Puyallup I) and Washington Game Dep't v. Puyallup Tribe, 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973) (hereinafter called Puyallup II). The totality of the facts in Department of Game v. Puyallup Tribe, Inc., 70 Wn.2d 245, 422 P.2d 754 (1967) and Department of Game v. Puyallup Tribe, Inc., 80 Wn.2d 561, 497 P.2d 171 (1972) when considered with Puyallup I and Puyallup II makes several things abundantly clear.

(1) Substantially all of the steelhead trout fishery occurs after their entrance into the Puyallup River; (2) that the case is concerned with the Puyallup Indians' use of set nets to catch steelhead in the Puyallup River; (3) that the only portion of the Puyallup River with which we are concerned flows through the Puyallup Indian reservation; (4) that

the present run of steelhead is made possible by the planting of steelhead; (5) that the planting program is financed in large part by the license fees paid by sports fishermen; and (6) that the central issue is the problem of accommodating the Puyallup Indians' net fishing and the non-Indian sports fishing with the conservation needs of the fishery.

It is equally clear the United States Supreme Court remanded the case for this state court to make a fair apportionment between Indian net fishing and non-Indian sports fishing under the above-related circumstances. The majority has accomplished this in an equitable manner.

I am convinced the Supreme Court did not direct this court to resolve the apportionment problem as an empty gesture. It is only logical to assume that once a formula resulting in fair distribution was achieved that the fair allocation should, insofar as possible, be maintained. If this assumption is not correct, then much of the language in Puyallup II is meaningless.

At first blush it would appear that the State lacks the necessary power to enforce the equitable apportionment directed by the United States Supreme Court.

In this regard see such cases as Menominee Tribe v. United States, 391 U.S. 404, 20 L. Ed. 2d 697, 88 S. Ct. 1705 (1968); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1932); Kimball v. Callahan, 493 F.2d 564 (9th Cir. 1974); Moore v. United States, 157 F.2d 760 (9th Cir. 1946); see also Seufert Bros. Co. v. United States, 249 U.S. 194, 63 L. Ed. 555, 39 S. Ct. 203 (1919); and United States v. Winans, 198 U.S. 371, 49 L. Ed. 1089, 25 S. Ct. 662 (1905). On the other hand, it is only logical to assume the Supreme Court is equally aware of the above cited cases and had them in mind when the following broad language was used in Puyallup II at page 49:

> The aim is to accommodate the rights of Indians under the Treaty and the right of other people.
>
> We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing

> should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.

(Italics mine.)

When one considers the fragile nature of the fishery involved, as well as the State's physical and financial support of that resource, it is easy to understand the above quoted language. If the Supreme Court has not recognized the existence of a State power to control and supervise the mandated allocation, the Supreme Court's direction would, for all practical purposes, be impossible to establish, implement, and enforce. Without question the Supreme Court did not intend to direct the State of Washington to perform a useless act.

For this reason, I am willing to accept the above quoted portion of Puyallup II at face value and concur in the

result reached by the majority.

/s/ Stafford, C.J.

I concur

/s/ Wright, J.

I concur

/s/ Utter, J.

I concur

/s/ Horowitz, J.

No. 43736

ROSELLINI, J. (concurring)--I concur in Justice Hunter's scholarly interpretation of the Medicine Creek Indian Treaty. This interpretation should dispose of the case. However, Justice Hunter felt compelled by the language found in Washington Game Dep't v. Puyallup Tribe, 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973), to review the determination of the amount of catchable fish to be apportioned between the commercial Indian net fishery and the hook and line fishery of other citizens.

I believe that any apportionment of the fish run is contrary to the treaty and the Constitutions of the United States and Washington. Apportionment cannot be sustained by the law, or the fact in the case.

I find nothing in the language of the Treaty of Medicine Creek, 10 Stat. 1132, or in the Treaty of Point Elliott, 12 Stat. 927 (2 Indian Affairs Laws & Treaties 669 (1904)), that would even imply that fish runs were to be apportioned between the Indians and the White settlers. In fact, the treaties negate any such interpretation.

The exact language of the treaty in-

corporated as it was in other similar treaties contemporaneously negotiated with tribes makes it clear that Indians were not to be excluded from fishing at their accustomed grounds, but these rights were to be co-extensive only with the citizens of the territory. Thus, the Indians shall have all fishing rights that all the citizens have, and no Indian or non-Indian shall have any superior right.

Any other interpretation would distort the obvious meaning of the language.

Article 3 of the Treaty of Medicine Creek, as noted says:

> ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: Provided, however, That they shall not take shell

> fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

(Italics mine.) 10 Stat. 1133.

There is no word in any of the articles or in any other treaty to suggest that either the Indians or the White settlers intended that Indian tribes have a superior right to fish not equally available to citizens of the territory.

The treaty made with the Quinaielt, Quillehute and other tribes, 12 Stat. 971-72 (2 Indian Affairs Laws & Treaties 719-20 (1904)), employs identical language to the Treaty of Medicine Creek concerning the right of taking fish in common with all citizens of the territory.

The Treaty of Point Elliott, 12 Stat. 927, 928, with the Dwamish, Suquamish, and other tribes employs the same language used in the Treaty of Medicine Creek and the treaty with the Quinielt and Quillehute:

> ARTICLE V. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shellfish from any beds staked or cultivated by citizens.

None of these treaties contains a hint that the Indians would acquire fishing rights superior to the citizens of the territory, or that the Indians would have a property right to 45 percent of the fish runs or any fraction of any fish run. The treaty gave the Indians and settlers a right to be held in common--the privilege or opportunity of catching fish.

Similarly, in the Treaty of Point no Point, 12 Stat. 933, 934, article 4 declares that

> [t]he right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; . . .

It will be noted that there is a minor departure from the language of the three other treaties is describing the settlers as citizens of the United States rather than as citizens of the territory. One cannot find from this treaty or the three other treaties any language which gives exclusive off-reservation fishing rights or any apportionment of the fish runs.

What the treaties said is that Indians should not be barred from an opportunity to fish any more than the settlers were denied the right to do so.

A treaty signed in June 1855 in Walla-Walla Valley between the United States and the Walla-Walla Tribe, 12 Stat. 945, 946, illustrates that the Indians and United States were capable of using explicit language when it was desired to give exclusive rights to Indians to fish. Article 1 of the treaty says

> [t]hat the exclusive right of taking fish

> in the streams running through and bordering said reservation is hereby secured to said Indians, and at all other usual and accustomed stations in common with citizens of the United States, and of erecting suitable buildings for curing the same; the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens, is also secured to them.

It can be seen that in the Walla-Walla Treaty, the Indians reserved the exclusive right to take fish from streams running through and bordering said reservation and outside their reservation in common with the citizens of the United States. There was no difficulty in selecting the words to convey the separate ideas of "exclusive rights" and "rights secured in common" with the citizens of the United States.

The precise distinction between exclsive and shared rights held in common with the citizens of the territory were made in a treaty with the Yakima Indian

Tribe. (See 12 Stat. 951).

A reading of all the treaties which were signed at about the time of the Medicine Creek Treaty in 1854 makes it clear that where an exclusive right was intended, and when a right to fish in common with the settlers or citizens was intended, language was used precisely to express the idea of exclusive rights and nonexclusive rights.

If it was intended to give 45 percent or any other portion of the fish runs to Indian or White citizens, language could have been used to express that intent. I find not even a hint that this was the intent of the treaties. I am sure that a treaty which would have given away any percentage of the fish runs would not have been ratified.

It must be remembered that the United States was inhabited by persons who left their homeland because of religious or political discrimination. They left also because of the economic discrimination. It must be remembered that game belonged to the King and to the estates of the lords. No one could hunt or fish without the consent of the King or the lords. In fact, poaching was a crime punishable by imprisonment or death. Thus, it would have been inconceivable that the citizens

or settlers of the United States would have allocation of fish or game.

In any event, article 6 of the United States Constitution reads:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; . . .

It will be seen that the United States Constitution, the laws made pursuant thereto, and the treaties are the supreme law. The laws enacted must pass the test of constitutionality. The treaties which are passed may not violate the constitution and may not deprive the citizen of any of his constitutional rights.

Treaties are part of the domestic law and where, as in this case, both parties to the treaties are citizens of the United States, the provisions of the constitution apply. Otherwise, the Executive and the Senate could by treaty which involves rights of its citizens disenfran-

chise a class of citizens. Any treaty right that gives Indians superior rights denies the equal protection of other "citizens" rights.

Let me further state why I think an apportionment of the fish run is legally incorrect.

It must be remembered that the steelhead fishery is financed by the purchase of fishing licenses and steelhead tags by the fishermen. None of the taxpayers' money is used for hatchery planting programs in restocking the rivers, except a very small amount furnished by the federal government.

Without the hatchery-reared steelhead planted in the rivers, there would not be any fish to catch and there would not be a natural run. My conclusions are based upon the following facts which logically follow from the planting statistics, and take into account the misconception of what is natural and what is native steelhead.

The record disclosed that natural or native steelhead is arbitrarily defined as any steelhead that does not have any hatchery marking. The record disclosed that the progeny of the hatchery-planted steelhead under this definition is

arbitrarily counted as a natural run of steelhead.

The following chart which sets forth the planting and catch of steelhead illustrates to my mind that without the large planting, the return of the steelhead would be minimal.

PUYALLUP RIVER SYSTEM STEELHEAD PLANTS AND CATCH

Winter Season	Cycle Plant[1].	Indian[2].	Sports	Total
1947-48			1,937	1,937
49			4,644	4,644
50	52,000		7,443	7,443
51	18,000		6,037	6,037
52	33,000		15,660	15,660
53	66,000	104	14,566	15,670
54	74,000	2,671	19,296	21,967
55	70,000	2,029	14,490	16,519
56	47,000	2,308	20,348	22,656
57	70,000	2,554	14,184	16,738
58	57,000	2,960	8,794	11,754
59	58,000	2,740	7,528	10,268
60	55,000	4,506	9,547	13,053
61	63,000	2,917	4,684	7,601
62	79,000	2,629	10,419	13,048
63	57,000	1,834	11,717	13,551

Winter Season	Cycle Plant[1].	Indian[2].	Sports	Total
1963-64	65,000		15,942	15,942
65	63,000		6,914	6,914
66	93,000		18,761	18,761
67	65,000		15,971	15,971
68	100,000		16,971	16,971
69	67,000		11,602	11,602
70	98,000	500	6,738	7,238
71	124,000	1,500	12,101	13,601
72	123,000		9,648	9,648
73	122,000	317	4,015	4,332

Winter Season	Cycle Plant[1].	Indian[2].	Sports	Total
1973-74	107,000	1,105 [2,500-3,000]*	[4,472]	
75	75,000			
76	68,000			

1. Cycle plants made 2 years prior to winter season, i.e., cycle plants of 52,000 (1950) was made in 1948 and contributed to the catch of 7,443 fish in 1949-50 winter season.

2. Data represents White River and Puyallup Indian catch as available and is incomplete.

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* The numbers appearing in brackets are not part of the exhibit. An explanation for the numbers is found on page 25 of this brief.

Respondent's Brief, Appendix; Exhibit 74-2.

Without the massive infusion of the hatchery fish, the steelhead runs subject to the net fishery would have been depleted.

The evil of permitting net fishing for steelhead is that it will devastate the run. The net fishery on the Skagit River exceeds 57 nets. Many of the nets are placed alternatively from one side of the river to the center of the river. The nets on the opposite side are placed alternatively so that they intersect the nets placed on the other side of the river. The effect is to block all upstream fish.

Steelhead are different from salmon, which spawn and die. Steelhead will spawn and live to return to spawn again. They are in a very poor condition after spawning and are regarded as unfit to eat. The nets not only take all the steelhead going upstream to spawn, but will catch all of the steelhead which have already spawned and are returning downstream.

Runs of steelhead enter rivers at different times during the season. It is possible to deplete the run at a certain period. It is urged that proper regulation can control this situation; however, the record is replete with evidence that net fishery cannot be successfully regulated.

The inefficiency of the enforcement of the regulation is shown by the fact that in December 1975, the Indians caught 2,476 fish on the Puyallup River, while 1,341 sportsmen fishing by line and hook caught only 102. In Western Washington Green River, 12,000 non-Indians caught only 50 fish, while Indian netters took 4,839. On the Skagit River, 893 sportsmen caught 89 fish while the Indians netted 2,367 fish.

Conservation means the wise use of the resource, and in the management of steelhead there must be necessary escapement for needed spawning to ensure the perpetuation of the resource.

The manner of fishing must be such that it can be controlled so it does not impair or damage the necessary escapement; and, further, the manner of fishing itself must not be destructive. The Department of Game, in order to conserve the steelhead runs, has placed limitations on the manner of fishing and the catch limit of steelhead. Non-Indians must fish with line and hook (as opposed to the Indian net fishing), and the non-Indian is limited to the maximum of two per day and no more than four in possession, and a maximun of 30 per season.

This case is entitled "Department of Game v. Puyallup Tribe, Inc." It suggests that the tribe itself is benefiting from the net fishery. However, the record shows that there are approximately 850 members of the Puyallup Tribe, of which 320 are over the age of 21. Twenty Puyallup Tribe fishermen fish essentially full time, 20 part-time, and an additional 20 fish only occasionally. The commerical value of steelhead caught by the Indians is approximately $10 a fish. The individual fishermen keep the proceeds of their fish sales, and this money is not shared with the tribe.

How can an apportionment of the catch, as found by the court, of 45 percent of the fish runs be equitable, fair, or conscionable when 60 Indians are allocated such a large proportion and thousands of non-Indians must share the remainder?

Under the Treaty of Medicine Creek, the only guarantee to the Indians is a right to the opportunity to fish. The treaty did not guarantee them any portion of the fish. Even if apportionment is permitted, should not the fish be divided more equitably between the non-Indian sportsmen and the Indians?

It must be remembered that before the incredible doctrine of apportionment

was announced, the Indians had the same right to fish, and in the same manner as non-Indians. The treaty Indians could fish as sportsmen or as commercial fishermen, whether it was by troller, gillnetting, or set net.

Heretofore, all citizens, whether Indians or non-Indians, were treated as equals. Now the courts have decided the rights of other citizens are inferior to Indian rights. I cannot subscribe to such a doctrine. I would hold that the treaty does not permit or contemplate any allocation of the fish, but rather the opportunity to fish and catch fish in the same manner as any citizen. I would take cognizance of the fact that fishing with fixed nets will devastate the fish runs and jeopardize one of the great natural resources of this state--a result which could never have been intended by any party to these treaties.

/s/ Rosellini, J.

I concur

/s/ Brachtenbach, J.

THE SUPREME COURT
OF
WASHINGTON

THE DEPARTMENT OF GAME, ET AL, Respondents,	)	
PUYALLUP TRIBE, INC., ET AL, Appellants	)	No. 43736
	)	ORDER DENYING PETITION FOR REHEARING

The Court having decided by a vote of seven to one that the appellants' petition for rehearing should be denied,

It is ordered that the petition be and it hereby is denied.

Dated this 25th day of June, 1976.

/s/
Chief Justice

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JUL 1 1976

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,
Respondent,
NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED and GARY ELLIS,
Intervenor-Respondents,

WESTERN STEELHEADERS, INC.,
Intervenor-Respondents,

v.

PUYALLUP TRIBE, INC., et al.,
Appellants.

REMITTITUR

No. 43736

Pierce County No. 158069

The State of Washington to: The Superior Court of the State of Washington

in an for Pierce County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on April 8, 19 76, became the final judgment of this court in the above entitled case on June 25, 19 76. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

Costs will be taxed by supplemental judgment following the Court's decision on the motion taken under advisement by the Court on June 4, 1976.

The petition for rehearing was denied by Order dated June 25, 1976.

cc: Counsel (per attached list)
Reporter of Decisions

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 28th day of June, A. D. 19 76

JOHN J. CHAMPAGNE
Clerk of the Supreme Court, State of Washington
By: Reginald N. Shriver, Deputy

8-68

SUP-007 (10-75)

Supreme Court, U. S.
FILED
SEP 22 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-423

PUYALLUP TRIBE, INC.,
and
RAMONA BENNETT,

Petitioners,

v.

DEPARTMENT OF GAME OF
THE STATE OF WASHINGTON,

Respondent.

APPENDICES C, D, E
TO PETITION FOR WRIT
OF CERTIORARI

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APPENDIX C

IN THE SUPERIOR COURT

OF THE STATE OF

WASHINGTON IN AND FOR

PIERCE COUNTY

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,	)	
Plaintiff,	)	No. 158069
vs.	)	MEMORANDUM DECISION
PUYALLUP TRIBE, INC.,	)	
Defendant.	)	

This case has been remanded to this court by the United States Supreme Court in order to have it determine the allocation between the Treaty Indians and others of the steelhead run in the Puyallup River. Department of Game of the State of Washington vs. The Puyallup Tribe, et al., 414 U.S. 44, 38 L.ed. 2d 254, 94 S. Ct. 330 (referred to hereafter as Puyallup I).

That allocation is to be accomplished by fairly apportioning that run on this river between these parties.

The U. S. Supreme Court in that decision interpreted the Medicine Creek Treaty on page 5 as follows:

> "The aim is to accommodate the rights of Indians under the Treaty and the rights of other people.
>
> "We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the specie [sic] regains assurance of survival. The police power of the state is adequate to prevent the steelhead from following the fate of the passenger

> pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets."

That court thus reaffirmed its prior holding that the police power of the state is adequate to prevent extinction of the specie and that there is no Treaty right that gives these Indians a federal right to pursue that last living steelhead.

That decision of the majority appears to be clarified by a concurring opinion to the extent that the Treaty rights of these Indians extend only to the natural run of the steelhead and that Treaty Indian fishery cannot take so many steelhead that the natural run would suffer progressive depletion.

This opinion refers to off-reservation rights of these Treaty Indians. In a prior opinion, The Puyallup Tribe v. Dept. of Game of Washington, 391 U. S. 391, 20 L.ed. 689, 88 S. Ct. 1725, (Referred to hereafter as Puyallup II), the court did not reach the question as to whether or not this Puyallup Indian Reservation still existed. See footnote on

page 691.

The trial court found it did not. Further comment on that issue will be made at a later point in this opinion. On the two prior occasions this case has been before the U. S. Supreme Court an interpretation of the Medicine Creek Treaty has been made by that court.

The construction of that Treaty in the case of Puyallup Tribe v. Department of Game of the State of Washington, supra, (May, 1968, Puyallup I) was as follows:

> 1. The "right" to fish outside of the reservation cannot be qualified by the State of Washington.
>
> 2. The Treaty "right" was to fish "at all usual and accustomed grounds and stations."
>
> 3. The Treaty "right" is not an exclusive one. It is one "in common with all citizens of the Territory."

4. The Treaty did not specify the manner in which the fishing may be done. This silence indicated that the State of Washington can regulate the manner of fishing, the size of the take, the size of the commercial take, and the like, for conservation purposes, providing the regulations meet appropriate standards and do not discriminate against these Indians.

5. The overriding police power of the State, expressed in non-discriminatory measures for conserving fish resources is preserved.

In the second case the U. S. Supreme Court further construed this Treaty. It held again in that case (Dept. of Game v. Puyallup Tribe, Inc., supra, (Puyallup II):

1. That the Treaty gave to these Indians the right to fish for steelhead commercially and with nets.

2. That the police power of the State has the authority to regulate the manner of fishing, the size of take, the restriction of commercial fishing, and the like, so long as the regulation is in the interest of conservation and the regulations do not discriminate against the Indians.

3. That the aim of the court was to accommodate the rights of the Indians under the Treaty and the rights of other people.

4. The Treaty rights of the Indians can be controlled by the need of preserve a species.

5. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeons.

> 6. The Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.

In that opinion three judges concurred. They further observed that this opinion meant:

> 1. That the Treaty did not obligate the state to subsidize the Indian fishery with planted fish paid for by sports fishermen.
>
> 2. The Treaty rights extend only to the natural run of steelhead.
>
> 3. The Treaty Indian fishery cannot take so many fish that the natural run would suffer progressive depletion.
>
> 4. That commercial fishing by these Indians cannot be totally forbidden in order to permit sports fishing in the usual volume.

> However, commercial fishing may be restricted in the interests of conservation.

Both opinions agree that the issue for resolution is the problem of accommodating commercial fishing by the Puyallups with conservation needs of the river and the rights of other people.

The word "conservation" was not defined in either of these decisions. That definition appears to be of paramount importance. In the original case that term was defined as follows, and I quote from the definition of J. E. Lasater, Associate Director of Operations, Department of Fisheries:

> "A. Very simply, it is wise use. When we put it in terms of salmon harvest, I would put it in three categories or three parts, by harvest, in management of salmon as a crop, <u>one</u>, there must be a surplus and over and above the needed spawning escapement to have an available crop and not be taking the feed stock. <u>Two</u>, the manner of

> fishing, itself, must be such that you can control it so that you do not dip into the seed stock. . . . The other thing is that the manner of fishing, itself, must not be destructive."

That definition was agreed to by all parties in this present trial.

Mr. Heckman, an expert witness for the defendant agreed to this definition but added only that there must be a maintenance of the habitat of the specie [sic].

I mention this aspect because it does bear on the extent of the regulatory authority of the state.

It is one thing to regulate for conservation with the purpose of preventing extinction of a specie, and quite another thing to regulate for the overall conservation program of the State of Washington. That program is designed to preserve and increase the production of salmon and steelhead for all user groups in all waters of the State of Washington. It is my opinion that all parties agree this is the program of the State of Washington in regard to all anadromous fish.

Accordingly I adopt that definition of the word "conservation" and interpret these two United States Supreme Court decisions to hold that the State of Washington has authority, for these conservation purposes, to regulate all persons in the manner in which they take fish and the amount of that take. These regulations must equally affect Treaty Indians when they fish off their reservation and must not discriminate against Indian fishery. Conservation in this regard is as helpful to the Treaty Indians as it is to all others. The fish are conserved, extinction is prevented and production increased and assured.

In order to apportion the steelhead in this circumstance it is necessary to again refer to the Treaty of Medicine Creek itself to determine and define a certain phrase.

The Treaty contains language in Art. 4, §3, as follows:

> "The right of taking fish, at all usual and accustomed grounds and stations in further secured to said Indians, in common with all citizens of the Territory,

and of erecting temporary houses for the curing, together with the privilege of hunting, gathering roots and berries, and pasturing horses on open and unclaimed lands:

> "Provided, however, that they shall not take shell fish from any beds staked or cultivated by citizens, and they shall alter all stallions not intended for breeding horses, and shall keep up and confine the later [sic]."

The phrase "in common with all citizens of the Territory" has not been specifically judicially defined.

There have been various judicial reference to that phrase, however. Kennedy v. Becker, 241 U. S. 556, 60 L.ed. 1167, decided in 1916, involved the interpretation of the Seneca Indian Treaty of 1797. It reserved to the Indians the privilege of fishing and hunting on lands located in the State of New York.

The question involved the prosecution of three Seneca Indians for spearing fish off the Seneca Reservation in violation of the statutes of the State of New York.

The pertinent language of that opinion is set out as follows:

> "The right thus reserved was not an exclusive right. Those to whom the lands were ceded, and their grantees, and all persons to whom the privilege might be given, would be entitled to hunt and fish upon these lands, as well as the Indians of this tribe. And, with respect to this non-exclusive right of the latter, it is important to observe the exact nature of the controversy. It is not disputed that these Indians reserved the stated privilege both as against their grantees and all who might become owners of

the ceded lands. We assumed that they retained an easement, or profit a prendre, to the extent defined; that is not questioned. The right asserted in this case is against the state of New York. It is a right sought to be maintained in derogation of the sovereignty of the state. It is not a claim for the vindication of a right of private property against any injurious discrimination, for the regulations of the state apply to all persons equally. It is the denial with respect to these Indians, and the exercise of the privilege reserved, of all state power of control or reasonable regulation as to lands and waters otherwise admittedly within the jurisdiction of the state.

"It is not to be doubted that the power to preserve fish and game within its borders is inherent in the

sovereignty of the state (Geer v. Connecticut, 161 U.S. 519, 40 L.ed. 793, 16 Sup. Ct. Rep. 600; Ward v. Race Horse, 163 U.S. 504, 507, 41 L.ed. 244, 245, 16 Sup. Ct. Rep. 1076), subject, of course, to any valid exercise of authority under the provisions of the Federal Constitution. It is not denied -- save as to the members of this tribe -- that this inherent power extended over the locus in quo and to all persons attempting there to hunt or fish, whether they are owners of the lands or others. The contention for the plaintiffs in error must, and does, [563] go to the extent of insisting that the effect of the reservation was to maintain in the tribe sovereignty quoad hoc. As the plaintiffs in error put it: 'The land itself became thereby subject to a joint property ownership

and the dual sovereignty of the two peoples, white and red, to fit the case intended, however, infrequent such situation was to be.' We are unable to take this view. It is said that the state would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the locus in quo, either would be free to destroy the subject of the power. Such a duality of sovereignty, instead of maintaining in each the essential power of preservation, would in fact deny it to both.

"It has frequently been said that treaties with the Indians should be construed in the sense in which the Indians understood them. But it is idle to suppose that there was any actual anticipation at the time the treaty was made of the conditions now

existing, to which the legislation in question was addressed. Adopted when game was plentiful, -- when the cultivation contemplated by the whites was not expected to interfere with its abundance, -- it can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wild life. But the existence of the sovereignty of the state was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not. We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative, or so to divide the inherent power of preser-

vation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with [564] grantees, and others to whom the privilege might be extended, but subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the state over the lands where the privilege was exercised. This was clearly recognized in United States v. Winans, 198 U.S. 371, 384, 49 L.ed. 1089, 1093, 25 Sup. Ct. Rep. 662, where the court, in sustaining the fishing rights of the Indians on the Columbia River, under the provisions of the treaty be-

tween the United States and the Yakima Indians, ratified in 1859 [12 Stat. at L. 951], said (referring to the authority of the state of Washington): 'Nor does it' (that is, the right of "'taking fish at all usual and accustomed places'") 'restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised.'"

This case held specifically that this clause was a reservation of a privilege of fishing and hunting on off-reservation lands in common with all others subject to the necessary power of appropriate regulation as to all those privileged to so fish and hunt. This power was inherent in the sovereignty of the State over the lands where the privilege was exercised.

This case cites as authority for that proposition United States v. Winans, 49 L.ed. 1089.

In Kennedy, supra, the use of the words "in common with" meant, in my opinion, that the Seneca Indians by reason of their Treaty could hunt and fish as any other person and in the same manner as any other persons, but that they had no greater right to, nor any right to be regulated differently from all others.

At that early date, 1917, the U. S. Supreme Court did establish a State's right to conserve its fish resources for the use of all who had a right or privilege to fish within its boundaries.

In the case of The Puyallup Tribe v. Dept. of Game, supra, (Puyallup I), at page 693, the U. S. Supreme Court reaffirmed that position when it held:

> "Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one 'in common with all citizens of the Territory.' Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not be regulated by an appropriate exercise of the

> police power of the State. The right to fish 'at all usual and accustomed' places may, of course, not be qualified by the state, even though all Indians born in the United States are now citizens of the United States."

The language in this opinion clearly, specifically and positively interprets the Medicine Creek Treaty to mean that the Treaty rights of these Indians to fish off reservation are not exclusive. They are to be exercised in common with all citizens of the Territory.

The rights of the citizens of the Territory can be regulated and so can the Indians.

In my opinion the only logical conclusion from this language is that fishing off reservation by non-Treaty Indians is to be shared with all the citizens just as though the Indians were citizens.

The phrase "in common with" is, again, in my opinion, a very simple, easily understood and comprehensive term.

The word "common" by definition means "of or relating to a community at large (as a family unit, social group, tribe, political organization or alliance) generally shared or participated in by individuals of a community: not limited to one person or special group."

I have in my personal law library a volume printed in 1793 entitled, "A New Abridgement of the Law." Its author was Matthew Bacon of the Middle Temple, Esq. On page 385 of that volume he defines the general law of "Common" and thereafter treats it in its various applications to page 394.

It is apparent from this ancient work that the law regarding "common" developed when many persons used another's property for pasturage of their animals. No one had any individual right greater than another's; common of piscary, the right of taking fish in another's fish pond, pool or river is specifically referred to on page 384.

Also see "An American Dictionary of the English Language," by Noah Webster dated 1828.

That definition has as its clear thrust and impact that a right in common

belongs to no one man but belongs equally to more than one, or to many indefinitely, as: life and sense are common to man and beast, or: the common privileges of citizens, the common wants of man. That is, a right in common belongs to the public; it has no separate owner.

Copies of that work are attached to this opinion. [See pages C-60-61 infra].

The derivation of the word "common" convinces me this is the proper definition.

I have read all the available material concerning the background leading up to the explanation of this proposed treaty by Governor Stevens and its eventual signature by all concerned. They are exhibits in this case. I insisted that I read the original records myself rather than rely on an interpretation of someone else.

Exhibit 74-31 is the "Record of the Proceedings of the Commission to Hold Treaties with the Indian Tribes in Washington Territory and the Blackfoot Country."

That document establishes that the Treaty was read section by section to the

Indians by the interpreter. There was no objection.

On page 8 of these records kept by James Doty the following reason was given for the formulation of Article III to the time of the meeting held with the Indians:

> "It was also thought necessary to allow them to fish at all accustomed places, since this would not in any way interfere with the rights of citizens, and was necessary for the Indians to obtain a subsistence."

This was Doty's explanation as to why this provision was placed in the Treaty. I have yet to see any reference to this document or this explanation any place in any analysis of the meaning of this phrase. But it clearly establishes in my mind that this was the explanation made to these Indians of Art. III of the Treaty. No reference is made to any different or greater rights on any reservation that might thereafter be established.

In these preliminary drafts of the proposed Treaty provision, Art. III was

differently stated. It was designated Art. II and stated:

> "Art. II. There is however reserved to the use of said tribes the following tracts, viz.:
>
> "The right of fishing at common and accustomed places is further secured to them; Proviso against states or claims.
>
> "May be removed from one reservation to another on payment for improvements and cost of removal."

At that time the phrase "in common with citizens of the Territory" was not included. The inclusion in the Treaty itself in Art. III, coupled with the explanation by James Doty, clearly convinces me that this Treaty was to grant the Indians the same rights of every citizen to fish outside of the reservation, nothing more but nothing less. Since the Indians were not citizens it seems apparent that was the plain intent of the article.

Governor Stevens in his address to this group advised them that the whites were coming, some to build mills, some to make farms and some to fish. He advised them it was the Great Father's wish that the Indians have homes, pasture for their horses and fishing places. The Great Father wanted them to learn to farm and the children to go to school.

The purport of the Treaty as explained and agreed to expressed the desire of the United States to alter tribal life to the extent they should become farmers and their children should attend schools. All plans were to integrate them into a pattern of life different than they had followed for generations. Those plans were satisfactory to these Indians.

This was fully explained to them by Governor Stevens on December 25, 1854 through interpreters. On the next day it was again explained to them by Governor Stevens through an interpreter.

Thus, the Treaty was read by section by section and explained to the Indians by an interpreter and every opportunity was given them to discuss it. The Indians did discuss it and then they signed it. I am satisfied from the evidence

that the Indians understood when they were told that they would be placed on reservations and would also be surrendering their claims to the rest of the land. In my opinion the remarks of Governor Stevens contained relatively simple concepts readily understood by these Indians who had been in contact from some years with the whites, both socially and commercially. All of the evidence supports this opinion.

Common ownership and common use of property were recognized and accepted aspects of Indian culture.

I am, therefore, convinced that this phrase in this Treaty, "The right to taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory," gave the right to these Indians to fish to the same extent as any other citizen of the territory and that there was no division of ownership of fish in any fashion granted. I reach this conclusion from the decisions already cited and the plain meaning of the term.

The defendants have urged this court to accept the definition of this phrase formulated by Judge George H. Boldt in the case of United States of America vs. The Puyallup Tribe, et al. [sic] See Exh. 74-B.

In that decision, at page 38, the phrase "in common with" is defined as follows:

> "By dictionary definition and as intended and used in the Indian Treaty and in this decision 'in common with' means sharing equally the opportunity to take fish[29] at 'usual and accustomed grounds and stations'; therefore, non-treaty fisherman shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all fisherman at usual and accustomed grounds and stations and treaty right fisherman shall have the opportunity to take up to the same percentage of harvestable fish, as stated above."

I must respectfully disagree with that definition.

On page 30 of that opinion Judge Boldt refers to the philosophy of Congress referred to in the evidence

submitted in the case he heard. He there states:

> ". . . this case presents an appropriate opportunity to take a step toward applying congressional philosophy to Indian Treaty right fishing in a way that will not be inconsistent with Puyallup-I and Puyallup II and also will provide ample security for interest and purpose of conservation."

The applicable principle for construing Indian Treaty language has been stated by the United States Supreme Court as follows:

> Judicial authority to interpret Treaties:
>
> "It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal represen-

tatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people. Tulee v. Washington, 315 U.S. 681, 684, 86 L.ed. 1115, 62 S.Ct. 862 (1942). But see New York ex rel. Kennedy v. Becker, 241 U.S. 556, 60 L.ed. 1166, 36 S.Ct. 705 (1916)."

In view of this principle of judicial interpretation it is my opinion his position has granted rights to all of these Treaty Indians contrary to those established by former decisions of the United States Supreme Court in regard to off-reservation fishing rights.

He has interpreted this phrase to mean that all of these Treaty Indians have a prior right to take 50% of the harvestable fish and that this right is one that is to be exercised prior to any fishery in off-reservation waters by other citizens of the Territory. (State) That this is an exclusive right to be exercised by these Treaty Indians.

In my opinion this interpretation is directly contrary to the ruling in Dept. of Game v. The Puyallup Tribe, et al. (Puyallup II), supra which has clearly stated at page 693:

> "Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one 'in common with all citizens of the Territory.'"

Respective places here referred to "at all ususal and accustomed places."

It must be clearly recognized that these Puyallup Indians have no claim to any reservation rights outside of a section of the Puyallup River.

I have made this comparison with Judge Boldt's decision for two reasons: One is that it was the position urged by the defendants. I felt the reason why I decided differently should be clearly stated.

The other reason is that the defendants apparently take the position that I was bound by Judge Boldt's decision.

It is my opinion Judge Boldt's decision is not controlling on the issue before me. The United States Supreme Court directed this court to allocate steelhead on the Puyallup River between Treaty and non-Treaty fishermen.

It is my understanding of the law that since these partices are before this court that problem is to be resolved by this court. In this circumstance no other court has jurisdiction of this subject matter at this time.

Thus the order of this court in this lawsuit will extend to the Treaty rights of the Puyallup Indians on the Puyallup River in regard to fishing for steelhead.

RESERVATION STATUS

The trial court in the original action made the following Findings of Fact:

"XII

"All of the lands within the exterior boundaries of the old Puyallup Indian Reservation were sold, in fee simple absolute, pursuant to an act of Congress (33 Stat. 565) with the exception of two small tracts which are presently being utilized as a cemetery for members of the federal organization known as the 'Puyallup Tribe.' The total acreage remaining in trust status is approximately 22 acres. The original reservation was in excess of 18,000 acres.

"XIII

"That the individual defendants began openly fishing the Puyallup River in 1953 contrary to the laws, rules and regulations of

the State of Washington. Since that time, the defendants have gradually increased the intensity of their drift net and set net fisheries, using modern nylon monofilament nets, to the point that the anadromous fish runs of the Puyallup River are presently unable to maintain themselves in an abundant supply without supplemental plantings by the state.

"XIV

"The Puyallup River from Commencement Bay to its upper tributaries constitutes and is a prime spawning and rearing area for anadromous fish.

"XV

"The defendants have indicated that unless unrestrained from so doing, they will continue to fish in the

Puyallup River and Commencement Bay in the manner in which their fishing activities have taken place since 1953.

"XVI

"That the place, time, and manner of fishing by the defendants was and is in violation of the rules, and regulations of the State of Washington. That the fisning activities of the defendants, if allowed to proceed unrestrained could result in the destruction or serious impairment of the anadromous fish runs of the Puyallup River.

"XVII

"That once anadromous fish runs in a river system have been destroyed, it is generally impossible to re-establish them.

"XVIII

"It is reasonable and necessary that state conservation, rules and regulations be uniformly applied to all citizens on an equal basis including the defendants."

From the Findings of Fact the Court made the following Conclusions of Law:

* * * * * * * * * * * * *

"II

". . .That the Puyallup Indian Reservation no longer exists and that the state has assumed total and complete jurisdiction over all lands situated within its boundaries.

"III

"That the anadromous conservation program of the State of Washington, as it affects the Puyallup River watershed and

Commencement Bay, is an integral and necessary part of an overall state conservation and preservation program for anadromous fish.

"IV

"It is reasonable and necessary that state conservation, rules and regulations be uniformly applied to all citizens on an equal basis including the defendants.

"V

"That the permit the defendants to fish as they have done since 1953, and as they would do in the future if not restrained, would seriously hamper and ultimately destroy the effectiveness of the state's conservation program, particularly as applied to the Puyallup River watershed and Commencement Bay.

I set those forth because they are still the law of this case in regard to those issues that have not been reversed by an appellate court.

So far as this case is concerned the Finding that the Puyallup Indian Reservation no longer exists has not been reversed. The United States Supreme Court did not reach a decision on that issue. I believe it is still for that body to determine, based on the evidence presented at the original trial of this matter. State v. Satiacum, 414 U.S. 1, 38 L.ed.2d 1, 94 S.Ct. _____, does not in my opinion reverse that finding.

Those Findings also determine that these defendants were fishing the Puyallup River to the extent that the anadromous fish runs of the Puyallup River were unable to maintain themselves in an abundant supply without supplemental plantings by the State of Washington. In other words that fishery was depleting the natural run of steelhead.

These Findings also determine that the fishing activities of the defendants, if allowed to proceed unrestrained, could result in the destruction, or serious impairment of the anadromous fish runs of the Puyallup River. They also determined

that once this run is destroyed it is generally impossible to re-establish.

Those Findings of Fact have never been reversed.

The status of this case then is that these defendants were fishing this river in violation of the conservation policies of the State of Washington and were in the process of destroying the anadromous fish run of this river. I believe that the United States Supreme Court has recognized that fact. In my opinion, it was for this reason that the Court ruled the Treaty of Medicine Creek did not grant a federal right to these Indians to destroy or deplete this fish run, and that the State did have authority to prevent the destruction or depletion.

Each Indian Treaty must be separately considered, for the language is not the same in every Treaty, rendering the rights and obligations of the parties different. The case of Mattz v. Arnett, 412 U.S. 481, 37 L.ed.2d 92, 93 S.Ct. 2245, established the proposition that the question of extinguishment of an Indian Reservation depends upon the facts of each case and the intention of Congress.

I have read the case of U. S. v. Washington, 496 F.2d 620. That case was decided by the Ninth Circuit Court of Appeals.

The United States Supreme Court has now declined to hear an appeal by the State of Washington in that case. This would indicate that the prior determination by Judge Cochran concerning the non-existence of the Puyallup Indian Reservation will be reversed by the United States Supreme Court. I accordingly accept that position.

This does not, in my opinion, dispose of the question remaining for solution, namely, the allocation of steelhead between Treaty and non-Treaty parties of the Puyallup River in its entirety.

In U. S. v. Wash., supra, the Ninth Circuit Court of Appealls stated simply the Puyallup Indian Reservation continued to exist. That holding was based on the case of Mattz v. Arnett, supra.

The Mattz case was a prosecution for violation of a state statute prohibiting the use of gill nets. It did establish that the Klamath River Indian Reservation was "Indian Country," within the meaning

of 18 USC §1151. That entire section is devoted to the jurisdiction of states over "Indian Country."

At page 95 of that opinion the court stated:

> "We now reverse. The reversal, of course, does not dispose of the underlying forfeiture issues. On remand, the questions relating to the existence of Mattz' fishing rights and to the applicability of California law notwithstanding reservation status will be addressed. We intimate no opinion on those issues."

It appears to me the question relating to the existence and extent of the fishing rights of the Puyallup Tribe within this reservation area is still a matter for determination by this court in regard to steelhead fishery.

This Treaty did not give these Indians the right to so conduct their fishery on their reservation property to the extent that it would damage or destroy the fish run that entered the Puyallup River.

These Indians now contend that since this reservation has been determined to still exist, they have the sole right, within the 7-mile area of the Puyallup River within the boundaries of their reservation, to fish as they desire and no one has any regulatory authority over them or the fish in this river. As a consequence, the fishing of the Puyallup Indians within that 7-mile area can be carried on in any manner they choose, and they can take all the fish they desire to the exclusion of all others. They also contend that they can take all of the harvestable fish that pass through that reservation area and that no other person has any right to any fish on the Puyallup River. This would give then complete control of, and ownership of, all anadromous fish in the entire Puyallup River system. No one else could take any fish without endangering the survival of the species. This would practically make the Puyallup River system the fish farm for these Indians alone.

I do not believe this Treaty ever contemplated such a situation.

In the Treaty of Medicine Creek, these Indians were given the right to fish in common with all citizens of the Territory. That right to fish has been

determined to be solely that since the Treaty did not provide otherwise. It was silent as to the manner of fishing, the size of the take and the restriction of commercial fishing.

It was also silent as to the amount of fish that could be taken. It did not by its terms grant to these Indians all of the fish that entered the Puyallup River, nor any specific quantity of fish. This Treaty did not give these Indians the right to fish in their usual and accustomed manner.

The Puyallup River was their ancestral home. The establishment of the Reservation by Executive Orders did not enlarge those Treaty rights. Both parties to this Treaty were aware that fish entering the Puyallup River went upstream to spawn and that their continued existence in this river was naturally dependent upon this situation.

Both parties were aware that the Reservation would not include the vast reaches of the Puyallup River (See map of the Puyallup River, Exh. 74-1. ((The approximate boundaries of the former reservation are outlined in pink.))) All parties were aware that fishing on this river would be conducted by both Treaty

and non-Treaty fishermen and that all parties fishing in this river should not jeopardize the natural fish run. It was for their mutual benefit to retain this important food source.

It only makes common sense that both parties understood the situation and that they both intended that neither would destroy or damage this marvelous natural bounty. It was not the intent of this Treaty that these Indians would have a right to all the fish that entered the Puyallup River. It was the intent of both parties that these Indians, and all others, were entitled to take a fair portion of the fish entering the Puyallup River going upstream to spawn.

Certainly if the non-Treaty parties were to take action which would prevent any migration into the Puyallup River, or to prevent fish from moving downstream through the old reservation area, these Indians would complain that this was a Treaty violation and, therefore, unlawful. These Indians would expect the courts to protect their Treaty rights. They would receive that protection.

These same Indians now take the position that they alone have the absolute right to destroy, or deplete, the

fish in this river, and that they have no obligation to see that this run is maintained. They also take the position that only Treaty Indians have any right to fish in the Puyallup River.

This is not the law in my opinion.

The question of conservation of fishery resources in its application to Indian reservations is a new one and has not been resolved at this time.

I am convincted that the United States Supreme Court will take the position that there is no federal right and thus no Treaty right by the Indians on this river to fish without some limitation. This limitation may be imposed either by a state court or by a Washington State regulation.

I am also convinced that the United States Supreme Court will hold that these Treaty Indians have only a right to fish for a fair portion of all fish passing through this reservation area consistent with the number of fish naturally propogated in this area.

In my opinion that is exactly what this Treaty meant, and the parties intended it to mean, when it was signed.

This interpretation does recognize the full obligation of this nation to protect the interests of a dependent people. It does conserve the natural fish run so that no one on this river can destroy or deplete it. Future generations of Puyallup Indians, and others, will be equally benefitted by this determination.

Otherwise these Indians today could take so much of the fish run that it would deplete it. From the Findings of Fact entered in this case that is exactly what they were doing when this case was originally heard. Their action at that time was contrary to the long-term interests of future generations of the Puyallup Indians. It certainly appears apparent that these future generations need protection of this vital fish resource.

That is not a case in which a lake is completely surrounded by an Indian reservation, where no question of others' rights is involved.

It is for that reason, I believe, the United States Supreme Court in its prior decisions in this case stated that the Treaty rights of these Indians extended <u>only to the natural run and that fishermen on this river were to share that run with the Treaty Indians</u>.

Even though this area is determined to be still reservation property and these Indians thereby could deny access to others on this 7-mile area of the river, it is obvious there is a vast area where such fishing can be accomplished by non-Treaty fishermen. It appears that the placement of this reservation at the mouth of the Puyallup River was never intended by <u>either party</u> to grant to these Indians the Treaty right to catch all of the fish that entered the Puyallup River on their way to spawn upstream. If this was the intention it could very easily have been so provided in the Treaty or the Executive Orders that established this reservation.

It is obvious from the Treaty itself that no white man could enter the reservation without proper consent. Within that reservation area these Indians had the exclusive right to fish in the Puyallup River. Fish caught there were theirs. But they did not convey to these Indians ownership of all the fish that entered the Puyallup River and were bound upstream to spawn through this area.

The upstream owners and the public also have certain rights and responsibilities. These non-Treaty parties have no right to monopolize these fish nor to

damage the natural run in this river. They in turn have the right to catch a fair portion of the fish that enter this river. These rights, of course, are subject to control by the State of Washington.

See 47 ALR 2d 370, 35 Am. Jur.2d Fish and Game, §6 through §21, pages 630 through 664.

In my opinion it was the intent of both parties to this Treaty that these Indians would fish within the reservation exclusively, but that they would not take so many fish that they would deprive upstream owners of a fair portion of that fish run, and that both parties would conduct their own fishery so that the natural fish run would not be progressively depleted.

Whether the State of Washington has the right to regulate fishing in the reservation area does not appear controlling. This court has the authority to allocate and regulate Treaty fishery in this area. This case was brought to determine the extent of the Treaty rights of these Indians and thus the resolution of that issue is within the issues presented to this court. The United States Supreme Court remanded this case to this

court to make an allocation of the natural steelhead run between Treaty Indians and other fishermen.

The Supreme Court ruled that these Indian Treaty rights could be controlled by the need to conserve a specie [sic]. The trial court in the original trial of this matter specifically found that the fishing activity of these Indians was in the process of damaging the runs of anadromous fish and that the fish runs were in danger of extinction or depletion.

It certainly appears from the testimony of Ms. Bennett, Chairwoman and member of the legislative body of the Puyallup Tribal Council, that these Indians historically fished in a manner guaranteeing that fish would get back to their natural spawning areas. Thus, there was never any intent to destroy any steelhead run (St. 761). Ms. Bennett also testified that the Tribe's prior regulations were based on good judgment and common sense. (St. 762)

The regulations of the Tribal Council itself recognize the need for escapement (St. 768).

The present Tribal policy was stated by Ms. Bennett to be that "the Tribe does not plan to significantly nor dispropor-

tionately change prior patterns of steelhead harvests, and that the Puyallup River should continue to provide a favorable sports fishing stream in both its metropolitan settings and its more secluded rural reaches." (St. 770-771, Exh. Q)

It was her testimony also that this Tribe planned to take ninety to one hundred per cent of the steelhead run available for harvest because the steelhead all go through the Puyallup reservation. (St. 733)

This intention appears to me to be contrary to the prior rulings of the United States Supreme Court and the statement of Tribal policy.

These Indians plan independently to determine the size of the steelhead run and would allow such escapement as they determine to preserve the steelhead run. In this context they do not differentiate between naturally propogated and hatchery propogated steelhead. It is their position that these are all steelhead and their rights extend to all such fish regardless of origin.

This would then mean that no owner upstream, or the other citizens of the

State of Washington, could fish for steelhead at all because any such fishing would deplete the remaining run of steelhead these Indians had allowed to escape.

Thus the State program, entirely financed by the sports fisherman of this State, would be entirely pre-empted by Treaty Indian fishery.

Ms. Bennett readily agreed that protection of the fish run was a necessity and that the Puyallup Tribe had their own conservation plan. She further agreed that the definition of the word "conservation" was that as set forth in pages 4 and 5 of this opinion.

It is apparent then that conservation is recognized as a necessity by all parties. The real issue is who establishes the number of fish that can be caught and by whom.

I am of the opinion that the United States Supreme Court specifically recognized the obvious need to conserve the steelhead run on this river. Accordingly it stated:

> "The aim is to accommodate the rights of Indians under the Treaty

and the rights of other people."

It is my opinion that the court held that the Medicine Creek Treaty did not grant the federal right to these Indians to destroy the natural run of steelhead by progressive depletion. Accordingly, it is my understanding of these decisions that the Indians have no exclusive right to the fish in this river. They share in common that right and the fish that enter the river with non-Treaty parties.

The Indian right to commercially fish for steelhead with nets and the rights of other people to fish for steelhead with hook and line must be accommodated.

The rights of the Indians can be controlled by the State of Washington for proper conservation. This Treaty does not give these Indians a federal right to pursue the steelhead to extinction. Therefore the State can enforce reasonable restrictions on the commercial fishing of Indians even though the fish pass through a portion of the river that would be designated within the boundaries of an Indian Reservation. To interpret that decision otherwise would be to allow these Indians the right they claim, that

is, to fish in any way they choose and to take as many fish as they desire. This would give them the right within the reservation boundaries to destroy the steelhead run. This right is not given to them by their Treaty.

In regard to hatchery-propogated steelhead, these fish are in effect entitled to safe passage through any such reservation boundaries because these Indians have no Treaty rights to these fish. In other words they cannot fish with nets for these fish. They must fish for them as any other fisherman in accordance with State authorized equipment. They need not be licensed. These Indians cannot sell them commercially.

The only practical method of allocation is to determine what percentage of the steelhead run are naturally-propagated and what percentage are hatchery-propagated.

As to the percentage naturally propagated these are to be allocated. As to the allocation to these Treaty Indians, they can fish for those with nets and sell them commerically.

To accomplish this division it is necessary that they court establish that

division and the number of fish to be taken by both parties.

ALLOCATION OF THE NATURAL STEELHEAD RUN

During this trial the only figures as to run size were offered by the State of Washington; it has the burden of establishing that fact.

These facts establish that of the actual steelhead caught and examined, 50% appeared to be of the naturally spawned variety and 50% appeared to be of the hatchery spawned variety.

The hatchery spawned variety were identified by a subbed dorsal fin. Both parties agreed to the existence of this characteristic.

Additionally facts further established that the smolt population that goes to sea are in equal numbers. The naturally propogated smolt are in the same number as the hatchery propogated steelhead. Thus an escapement, that is a return to spawn, would be 50% naturally propogated and 50% hatchery propogated.

The statistics in regard to run size are not precise. This is at best an imprecise operation. I took an average over a 10-year period from 1964 to 1973. Sportsmen caught a total of 118,663 steelhead in that period, an average of 11,866 fish per year. There were no Indian figures available. But during the 10-year period from 1954 to 1963 the total Indian catch reported was 27,140, an average Indian catch of 2,714 per year. The Department of Game felt these Indian catch figures were fairly accurate. In addition, the evidence disclosed that the steelhead run over the past 10 years has been fairly constant, although a decline has been noted in the past 2 years. Of course the State has continued to plant steelhead produced by its hatchery program.

In that regard I find that this hatchery program is financed entirely from funds received from sports fishermen for licenses and punch cards. No federal funds are spent on the program which involves the Puyallup River planting of steelhead raised in the South Tacoma Fish Hatchery.

In the 10-year period from 1954 to 1963 sports and Indian fishery caught a total of 145,811 steelhead, or an average

of 14,581 per year. This 10-year period establishes that this river will support an average yearly run of combined natural and hatchery propogated steelhead of 29,162. That figure represents the total yearly average run of steelhead. That figure is arrived at by doubling the catch estimate to arrive at the total run in order to establish a catch and an escapement determination. One-half of that number must be allowed to escape to spawn so that that run size will not be depleted. That leaves one-half, or 14,581, subject to be caught or harvested.

In this connection, since there is an even return of natural and hatchery-reared steelhead, 7,290 are natural and 7,290 are hatchery-reared steelhead. So that of the 14,581 steelhead subject to harvest 7,290 are hatchery reared and the Indians have no Treaty right to net any of these fish nor to sell them commercially. This number is subject to hook and line fishing only. Indians, of course, can fish for these, but only with regular gear, and not with nets, spears or any other method which differs from that allowed by the sports fishermen.

Of the remaining 50% that I have allocated to natural propogation [sic], 7,290, the United States Supreme Court has

directed allocation to be made between Treaty Indians and others.

In this connection, it must be kept in mind that, despite prior classification by the State of Washington of this steelhead as a game fish, these Indians have the right to net these steelhead and sell them commercially.

The Puyallup Indians numbered approximately 100 in 1854, at the time the Treaty was executed. (Finding of Fact IV). All of them lived from fishing.

At this time there are 20 regular Treaty Indian fishermen on this river. An additional 20 do parttime fishing. Some 20 more derive some support from these 40.

It certainly must be also kept in mind that earning a living from this activity is to be considered more important than fishing for recreation.

Accordingly, to allocate this natural run of steelhead between sports and Treaty fishermen, that factor has to be given considerable weight. I believe I must also recognize that these Indians are chiefly interested in the commercial catch and not in any sports fishing for

steelhead. Another factor I considered was that the hatchery planting program does increase the natural run. A hatchery propogated [sic] steelhead that returns to spawn, and does in fact spawn, contributes to the naturally propogated [sic] run.

In view of these factors, the number of Treaty Indians and sports fishermen involved, I would allocate 45% of those fish to the Treaty Indians, or a catch of 3,280. That would leave a catch of the natural run of 4,010 for the sports fishermen. The sports fishermen will also be fishing for steelhead in the hatchery propogated steelhead of 7,290.

I realize that no fish can be segregated prior to the time it is caught. But I believe since the return of steelhead is equally divided between natural and hatchery reared, it will work out so that each group will be catching half natural and half hatchery propogated [sic] fish.

To control this catch the defendant is to take a count of the steelhead caught and report it to this court to see that they stay within that limit. The fishing season of these Indians will be twice as long as it was last year, but in no event can they take over 3,280

steelhead.

The sports fishery will be of the same duration as last year and the State will take at least two (2) creel census to determine sports fishery on this take and they shall likewise stay within that limit.

The State of Washington Department of Game is to continue their planting of smolts in this river as it has in the past.

This allocation will continue until further order of this court. A yearly review of all catch figures will be made by this court because Indians net fishery for steelhead has been prohibited for years, and this will have to be monitored to make certain it will not deplete the run.

The fishing by defendants is to be carried on only by duly enrolled members of the Puyallup Tribe. That roll must be properly authenticated and filed with this court to determine the number and names of the fishermen so that only properly eligible fisherman, who in fact have these Treaty rights, are so fishing in this area. That roll must be filed with this court within thirty (30) days

of the date the Findings of Fact and Conclusions of Law are signed by this court.

I have read a great number of cases which I have not referred to in this opinion, nor attempted to point out distinguishing features. I hope to have those cases listed and available at the time the Findings of Fact are signed in this matter.

Dated at Tacoma, Washington, this 23rd Day of December, 1974.

S/ W. L. BROWN, JR.
J U D G E

AN

AMERICAN DICTIONARY

OF THE

ENGLISH LANGUAGE;

CONTAINING

THE WHOLE VOCABULARY OF THE FIRST EDITION IN TWO VOLUMES QUARTO; THE ENTIRE CORRECTIONS AND IMPROVEMENTS OF THE SECOND EDITION IN TWO VOLUMES ROYAL OCTAVO;

TO WHICH IS PREFIXED

AN INTRODUCTORY DISSERTATION

ON THE ORIGIN, HISTORY, AND CONNECTION, OF THE LANGUAGES OF WESTERN ASIA AND EUROPE, WITH AN EXPLANATION OF THE PRINCIPLES ON WHICH LANGUAGES ARE FORMED.

BY NOAH WEBSTER, LL.D.,

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GENERAL SUBJECTS OF THIS WORK.

I.—ETYMOLOGIES OF ENGLISH WORDS, DEDUCED FROM AN EXAMINATION AND COMPARISON OF WORDS OF CORRESPONDING ELEMENTS IN TWENTY LANGUAGES OF ASIA AND EUROPE.

II.—THE TRUE ORTHOGRAPHY OF WORDS, AS CORRECTED BY THEIR ETYMOLOGIES.

III.—PRONUNCIATION EXHIBITED AND MADE OBVIOUS BY THE DIVISION OF WORDS INTO SYLLABLES, BY ACCENTUATION, BY MARKING THE SOUNDS OF THE ACCENTED VOWELS, WHEN NECESSARY, OR BY GENERAL RULES.

IV.—ACCURATE AND DISCRIMINATING DEFINITIONS, ILLUSTRATED, WHEN DOUBTFUL OR OBSCURE, BY EXAMPLES OF THEIR USE, SELECTED FROM RESPECTABLE AUTHORS, OR BY FAMILIAR PHRASES OF UNDISPUTED AUTHORITY.

REVISED AND ENLARGED,

BY CHAUNCEY A. GOODRICH,

PROFESSOR IN YALE COLLEGE.

WITH PRONOUNCING VOCABULARIES OF SCRIPTURE, CLASSICAL, AND GEOGRAPHICAL NAMES.

TO WHICH ARE NOW ADDED

PICTORIAL ILLUSTRATIONS,

TABLE OF SYNONYMS, PECULIAR USE OF WORDS AND TERMS IN THE BIBLE, APPENDIX OF NEW WORDS, PRONOUNCING TABLE OF NAMES OF DISTINGUISHED PERSONS, ABBREVIATIONS, LATIN, FRENCH, ITALIAN, AND SPANISH PHRASES, ETC.

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1862.

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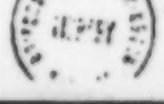

5. To come putting that, *but* a contrast; to which; followed by with, a Latinism.

But to a lover's ear what could with this compare? [Love and.] *Shen.*

6. To give in a state of hostility or inconformity. "*Commit* steel and bone mails." But this seems to be the same signification as the foregoing.

7. To expose or endanger by a preliminary step or stretch which can not be recalled, as, to commit the peace of a country by espousing the cause of a belligerent.

The people have manifested every desire of perfect friendship with us consistently with the honor of your sovereign. *Jefferson.*

8. To engage; to pledge; or to pledge by implication.

The general allowed them to fight, and to Gen. Howe's answering them assent as to the request, which could be granted or answering the task of the bravest foes. *Marshall.*

And with the reciprocal pronoun, to commit one's self, or *to do* some act, or make some declaration, which may bind the person in honor, good faith, or consistency, to pursue a certain course of conduct, or to adhere to the tenor of that declaration.

9. To refer or intrust to a committee, or select number of persons, for their consideration and report; *a term in legislation*; as, the petition or the bill is committed. Is it the pleasure of the house to commit the bill?

10. *To commit fully*, is to *commit* to prison *for* trial, in distinction from a temporary *commitment* while under examination. *Bouvier.*

COM-MIT'MENT, n. The act of committing; a sending to prison, a putting into prison; imprisonment. It is equivalent to *arrest* or *putting to* simply; as, a *commitment* to the Tower, or to Newgate; or, for the sake of brevity, omitting the name of the place, it is equivalent to *putting into prison*; as, the officer is censured by *commitment*.

2. An order *for* confining in prison. But more generally we use *mittimus*.

3. The act of referring or intrusting to a committee *for* consideration; *a term in legislation*; as, the *commitment* of a petition or a bill to a select number of persons for consideration and report.

4. The act of delivering in charge, or intrusting.

5. A doing, or perpetration, as of sin or a crime; commission. *Clarendon.*

6. The act of pledging or engaging; or the act of exposing or endangering. [See the verb, Nos. 7 and 8.] *Hamilton.*

COM-MIT'TAL, n. A pledge, actual or implied.

COM-MIT'TED, pp. Delivered in trust; given in charge; deposited; imprisoned; done, perpetrated; endured; exposed; *referred* to a committee.

To be committed, committed to prison for trial. [See Commit.]

COM-MIT'TEE, n. One or more persons elected or appointed, to whom any matter or business is referred, either by a legislative body or other branch of it, or by a court, or by any corporation, or by any society, or collective body of men acting together. In legislative bodies, a house or branch of that body may resolve or form itself into a committee, called a *committee of the whole house*, when the speaker leaves the chair, and one of the members acts as chairman. *Standing committees* are such as continue during the existence of the legislature, and to them are committed all matters that fall within the purview of their appointment; as, the *committee of elections*, or *of privileges*, &c. *Special committees* are appointed to consider and report on particular subjects.

COM-MIT'TEE-SHIP, n. The office and profit of committees. *Milton.*

COM-MIT'TER, n. One who commits; one who does or perpetrates. *South.*

COM-MIT'TI-BLE, a. That may be committed. [*Little used.*] *Lewis.*

COM-MIT'TING, *ppr.* Giving in trust; depositing; imprisoning; perpetrating; engaging; referring to a committee; exposing.

COM-MIX', v. t. [L. *commixtus*, *commutus*; *con* and *mixo*, to mix. [See Mix.]

To mix or mingle; to blend; to mix, as *dull* and *sub*stances. *Bacon. Morton.*

COM-MIX', v. i. To mix; to mingle. *Ash.*

COM-MIX'ED, (kom-mixt',) *pp.* Mixed; blended.

COM-MIX'ING, *ppr.* Mixing; blending.

COM-MIX'TION, (kom-mix'chun,) n. Mixture; a blending of different ingredients in one mass or aggregate. *Bacon.*

Commixture is used by Shakspeare, but is hardly legitimate.

COM-MIX'TURE, (kom-mix'tyur,) n. The act of mixing; the state of being mixed; the blending of ingredients in one mass or aggregate. *Locke.*

2. The mass formed by mixing different things; compound; compound. *Johnson. Burke.*

3. In *Scots law*, a confusion of moveable property, by blending different parcels belonging to different proprietors. *Erskine.*

COM-MODE', n. [Fr., from L. *commodus*, *con* and *modus*, manner; *con*, or *com*, and *modus*, manner.] A kind of head dress formerly worn by ladies. *Addison.*

2. A chest of drawers often with shelves added, and of various sizes.

COM-MO'DI-OUS, a. [*Fr. commode*; It. *comodo*; Sp. id.; L. *commodus*. See Mode.]

Convenient, suitable, fit, proper; adapted to its use or purpose, or to wants and necessities; as, a commodious house or room.

The house was so commodious to retire in.—*Arts and sc.* 14.

It is followed by *for* before a noun; as, a place *commodious for* a camp.

COM-MO'DI-OUS-LY, *adv.* Conveniently; in a commodious manner; suitably; in a manner to afford ease, or to post of inconvenience; as, a house *commodiously* situated; we may pass life *commodiously* without the luxuries of economy.

COM-MO'DI-OUS-NESS, n. Convenience; fitness; suitableness for the purpose; as, the *commodiousness* of a house or an apartment; the *commodiousness* of a situation for trade.

COM-MO'DI-TY, n. [L. *commoditas*; It. *comodità*; Fr. *commodité*; Sp. *comodidad*; Port. *commodidade*. See Commode.]

1. *Proximity*, convenience; profit; advantage; interest. "Men seek their own *commodity*." In the sense it was used by *Hooker*, *Sidney*, &c.; but this is nearly or wholly obsolete.

2. That which affords ease, convenience, or advantage; any thing that is useful, but particularly in commerce, including every thing movable that is bought and sold, goods, wares, or merchandise, produce of land and manufactures. Unless, perhaps, animals may be excepted, the word includes all the movables which are objects of commerce.

Commodities are movables, valuable by money, as common things. *Locke.*

The principal use of money is to ease the commerce of such commodities. *Arbuthnot.*

Staple commodities, are those which are the produce or manufacture of a country, and constitute the principal articles of exportation. Thus flour is the staple commodity of New York and Pennsylvania; flour and tobacco, of Maryland and Virginia; rotton and rice, of South Carolina and Georgia; cotton and sugar, of Louisiana.

COM'MO-DORE, n. [This word is probably a corruption of the Italian *comandatore*, a commander; or the Spanish *comendador*, a superior of a monastery, or a lord, who holds a commandery.]

1. The officer who commands a squadron or detachment of ships, destined on a particular enterprise. In the British navy, a naval officer having the temporary rank of a rear-admiral. *Encyc.*

2. A title given by courtesy to the senior captain, when two or more ships of war are cruising in company. *Totten.*

3. The convoy or leading ship in a fleet of merchantmen, which carries a light in her top to conduct the other ships.

COM-MO'DU-LATION, n. [L. *con* and *modulatio*.] Measure; agreement. [*Little used.*] *Hakewill.*

COM'MON, *adv.* [Contracted from *commonly*.] Commonly; usually. *Shak.*

COM'MON, a. [L. *communis*; Fr. *commun*; Arm. *comun*; It. *comune*; Sp. *comun*; Port. *commum*; Goth. *gamains*; Sax. *gemæne*; G. *gemein*; D. *gemeen*; Sw. *gemen*; Dan. *gemen*; Fr. *commun*; Goth. *gamains*, a fellow, a comrade. This word may be compounded of *con* and *mon*, *con*, the plural *con* being equivalent to *people* and *vulgus*. The Sax. *mæne* is evidently from the root of *mon*, which seems to belong to the root of *men*, and *mon* is of the same family. Here we see the connection between *common* and *man*, as *vulgus*, *vulgaris*, from *vulgus*, Eng. *folk*.]

1. Belonging equally to more than one, or to many indefinitely, or, in a wide sense, to mankind or to man and beast; the *common* privileges of citizens; the *common* wants of men.

2. Belonging to the public; having no separate owner. The road is a highway to *common*.

3. General, serving for the use of all; as, the *common* prayer.

4. Universal, belonging to all; as, the earth is and will be the *common* inheritance of mankind.

5. Usual, general, frequent, as, *common* report.

6. Usual, ordinary; as, the *common* operations of nature; the *common* forms of conveyance; the *common* use of a day.

7. Of no rank or superior excellence; ordinary. *Applied to men*, it expresses, but more, not distinguished by birth, character, or talents, as a *common* man; a *common* soldier. *Joined to things*, it expresses, and derives its force from the context; as, a *common* house, a house not distinguished by extent or any beauty; a *common* table, a table not provided with delicacies; a *common* dish, a dish not provided for use, which expresses something of contempt.

8. Prostitute; bawd; as, a *common* woman.

9. In *grammar*, such nouns as belong to all persons and genders, or to all of one gender, as, *parent*, *friend*, *child*, which belong to *he* both masculine and feminine; so, *parson*.

10. A woman bad, in *botany*, to one that produces both leaves and flowers; a *common* person, one that has no regard to modesty; a woman *promiscuously* and *indiscriminately* prostitute.

11. A woman bad, in *botany*, to one that produces both leaves and flowers; a *common* person, one that has no regard to modesty; a woman *promiscuously* and *indiscriminately* prostitute.

Common *sense*, or *common*, in mathematics, is a number of quantities that divide a number of other numbers or quantities without a remainder.

Common law: in *Great Britain* and the *United States*, the *unwritten law*, the law that derives its binding force from immemorial usage and universal reception, in distinction from the *written* or *statute law*. That body of rules, principles, and customs which have been received from our ancestors, and by which courts have been governed in their judicial decisions. The evidence of this law is to be found in the reports of these decisions, and the records of the courts. Some of these rules have originated in modes of action which are now laid, or on the forms and precedents of proceedings or charters; but a great portion of them originated in judicial decisions founded on natural justice and equity, or on local customs.

Common pleas: in *Great Britain*, one of the King's courts, now held in Westminster Hall. It consists of a chief justice and three other *justices*, and has cognizance of all civil causes, real, personal, or mixed, as well by original writ as by removal from the inferior courts. A writ of error, in the nature of an appeal, lies from this court to the King's Bench. *Blackstone.*

In *some of the American States*, a court of *common pleas* is an inferior court, whose jurisdiction is limited to a county, and is more limited as to amount in value. This court is commonly established in each county of a State, and its powers are defined by statute. It has jurisdiction of civil causes, and of most criminal offenses, but the final jurisdiction in many of the latter cases, especially in capital offenses, is in the superior court by appeal, or by writ of error.

Common prayer: the liturgy of the Church of England, which all the clergy of the church are required to use, under a penalty. *Encyc.*

Common recovery: a legal process for barring estates, tenants, &c. [See Recovery.]

Common seal: in *law*, the name given to those varieties of form, in which the manner or mode of the act of a corporation is expressed. *Encyc. Johnson.*

In common: equally with others, or with others; to be equally used or participated in by two or more persons, bodies or classes; as, lands held *in common*; to assign lands to two persons *in common*, or to them *in common*; we enjoy the benefits of Providence *in common*.

COM'MON, n. A tract of ground, the use of which is not appropriated to any individual, but belongs to the public, or to a society. Thus we say, the word is an open ground or space in a large city, reserved for public use.

2. In *law*, an open ground, or tract used for the use of which belongs equally to the inhabitants of a town or of a hundred, or to a certain number of persons, here or the public at large, or to the owner of one tract of a right which is appurtenant to another tract, as to feed cattle, or to cut wood, or the like, or to the owners of a manor, of burgesses, of persons, and of cottagers.

Common, or profit of *common*, is, *of pasture*, appurtenant, *because of vicinage*, or neighborhood.

Common of pasture, is a right to be given to the owners or occupiers of arable land to put their cattle to feed upon the lord's waste, and upon the lands of other persons within the same manor. This is a right of most universal extent.

Common appendant, may be annexed to lands in other hands, or parcel of other lands, to which the owner of the common has no title. It is of ancient time, and had its original only by immemorial usage and prescription.

Common because of vicinage, or neighborhood, is where the inhabitants of two towns have each right of common in the others' fields; these rights are usually regulated by ancient usage, and the limits of the several rights are known to the inhabitants.

Common in gross, or *at large*, is a right granted to a person, being neither lord nor freeholder of the manor, to put his beasts on the waste of the manor, or on the land of a private person, or to dig turf, &c.

Common sans nombre, is a right to put a number of cattle on the commons, which cannot be ascertained.

Common of shack, is a right of feeding cattle on the stubble of corn, after the harvest is carried off.

Common of turbary, is a right of digging turf on another's ground.

Common of estovers, is a right of taking wood for fuel, fences, &c.

Common of piscary, is a right of fishing in another's water.

Common pur cause de vicinage, is where the inhabitants of two adjoining townships have usually depastured their cattle promiscuously on the lands lying next to each other, without any distinction of property.

Common appendant, *appurtenant*, or *because of vicinage*, is that which is annexed to the possession of arable land, and is a right of pasture for beasts commonly used in husbandry upon the arable land, and is usually appendant to houses or lands lying in ancient villages.

Common in gross, or *at large*, is a right which a man has to put a certain number of beasts or other cattle upon another man's land; as, a man may have a right of common for a hundred sheep, or for a certain number of cattle, upon the land of another, and this right may be annexed to a house or other estate, or it may be in gross, or annexed to the person of the owner.

COM'MON, v. t. To have a joint right with others in common ground.

2. To board together, to eat at a table in common with others.

COM'MON, v. i. To converse.

COM'MON-A-BLE, a. One who enjoys common rights.

COM'MON-AL'TY, n. The body of commoners, or those who have a right of common. *Carew.*

COM'MON-ER, n. One who enjoys common rights.

2. One of the common people, as opposed to the nobility; a member of the House of Commons.

3. A student in the University of Oxford, who is not on the foundation, and who is allowed to dine at the common table.

COM'MON-ING, *ppr.* Conversing.

COM'MON-ING, n. The act of turning cattle on a common.

COM'MON-ING, n. The act of boarding together, and eating at a common table.

COM'MON-ING, n. The act of digging turf on another's ground.

COM'MON-ING, n. The act of fishing in another's water.

COM'MON-ING, n. The act of cutting wood for fuel, fences, &c., on another's ground.

COM'MON-ING, n. The act of feeding cattle on the stubble of corn, after the harvest is carried off.

COM'MON-ING, n. The act of taking wood for fuel, fences, &c

APPENDIX D

IN THE SUPERIOR COURT

OF THE STATE OF WASHINGTON

IN AND FOR PIERCE COUNTY

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,	)	
Plaintiff,	)	No. 158069
vs.	)	FINDINGS OF FACT AND
PUYALLUP TRIBE, INC.,	)	CONCLUSIONS OF LAW
Defendant.	)	

THIS MATTER having come on regularly for trial commencing June 3, 1974, before the undersigned Judge of the above-entitled court pursuant to an amended petition for declaratory relief pursuant to the remand of the Supreme Court of the State of Washington in accordance with the United States Supreme Court decision in this matter, 414 U.S. 44, and the state Supreme Court decision in 80 Wn.2d 561, 497 P.2d 171. This action was previously considered by the Washington State Supreme Court in 70 Wn.2d 245, 422 P.2d 754, and by the United States Supreme

Court in 391 U.S. 392. The plaintiffs having been represented by the Honorable Slade Gorton, Attorney of the State of Washington, through Edward B. Mackie, Deputy Attorney General; the intervenor-plaintiff Northwest Steelheaders Council of Trout Unlimited and Gary Ellis, being represented by Don S. Willner and Vincent R. Larson; the intervenor-plaintiff Western Steelheaders, Inc. being represented by James Tannesen; the defendant Puyallup Tribe represented by the Honorable Stan Pitkin, United States Attorney for the Western District of Washington, Thomas P. Giere, Assistant United States Attorney, George D. Dysart, Assistant Regional Solicitor, United States Department of Interior, and William H. Rodgers, Jr.; and Mr. John Sennhauser appearing for defendant Ramona Bennett, chairperson of the Puyallup Tribal Council; and the Court having reviewed the files and records herein insofar as material to the instant proceedings and having heard extensive evidence, examined exhibits and reviewed briefs and pleadings and arguments by counsel and having entered a memorandum decision on December 19, 1974, now enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

This action was commenced by the Department of Fisheries and Department of Game of the State of Washington in November, 1963. The Honorable John S. Cochran, Judge, Pierce County Superior Court, on August 13, 1965, following the trial, entered Findings of Fact, portions of which reads as follows:

* * * * * * * * * * *

"XII

"All of the lands within the exterior boundaries of the old Puyallup Indian Reservation were sold, in fee simple absolute, pursuant to an act of Congress (13 Stat. 561) with the exception of two small tracts which are presently being utilized as a cemetery for members of the federal organization known as the 'Puyallup Tribe.' The total acreage remaining in trust status is approximately 22 acres. The original reservation was in excess of

18,000 acres.

"XIII

"That the individual defendants began openly fishing the Puyallup River in 1953 contrary to the laws, rules and regulations of the State of Washington. Since that time, the defendants have gradually increased the intensity of their drift net and set net fisheries, using modern nylon monofilament nets, to the point that the anadromous fish runs of the Puyallup River are presently unable to maintain themselves in an abundant supply without supplemental plantings by the state.

"XIV

"The Puyallup River from Commencement Bay to its upper tributaries constitutes and is a prime spawning and rearing area for anadromous fish.

"XV

"The defendants have indicated that unless restrained from so doing, they will continue to fish the Puyallup River and Commencement Bay in the manner in which their fishing activities have taken place since 1953.

"XVI

"That the place, time and manner of fishing by the defendants was and is in violation of the rules, and regulations of the State of Washington. That the fishing activities of the defendants, if allowed to proceed unrestrained could result in the destruction or serious impairment of the anadromous fish runs of the Puyallup River.

"XVII

"That once anadromous fish runs in a river system have been destroyed, it is generally impossible to re-establish them.

"XVIII

"It is reasonable and necessary that state conservation, rules and regulations be uniformly applied to all citizens on an equal basis including the defendants.

"II

"That the federal organization known as 'the Puyallup Tribe of Indians" was not signatory to the Treaty of Medicine Creek and that any blood line descendants of the aboriginal Puyallup Tribe who also may be members of the present day federal organization have no rights by virtue of said treaty. That the guardian-ward relationship between the United States Government and the defendants was severed when the lands comprising the Puyallup Indian Reservation were authorized to be sold in 1903. That the Puyallup Indian Reservation no longer exists and that the state has assumed total and complete jurisdiction over all lands situated within its

boundaries.

"III

"That the anadromous fish conservation program of the State of Washington, as it affects the Puyallup River watershed and Commencement Bay, is an integral and necessary part of an overall state conservation and preservation program for anadromous fish.

"IV

"It is reasonable and necessary that state conservation rules and regulations be uniformly applied to all citizens on an equal basis including the defendants.

"V

"That to permit the defendants to fish as they have done since 1953, and as they would do in the future if not restrained, would seriously hamper

and ultimately destroy the effectiveness of the state's conservation program, particularly as applied to the Puyallup River watershed and Commencement Bay.

* * * * * * * * * * *

"Done in open court this thirteenth day of August, 1965.

"JOHN D. COCHRAN
JUDGE."

II.

Following the first Washington State Supreme Court decision, 70 Wn.2d 245, 422 P.2d 754 (1967), and the first United States Supreme Court decision, 391 U.S. 392, this proceeding was remanded to the Pierce County Superior Court, and following a trial, the Honorable Bartlett Rummel, Judge, Pierce County Superior Court, entered Findings of Fact of December 30, 1970.

III.

The Washington State Department of Game is charged by law with the responsibility for the management and conservation

of the steelhead resource in this state. Under Washington State law fishing for steelhead by non treaty parties is restricted to hook and line fishery, and the commercial sale of steelhead by these parties is prohibited. To manage and conserve this resource the Department has established a regulation for non-treaty fishermen that provides a limit of 30 steelhead per season per fishermen, 2 steelhead per day, and no more than 4 in possession at any given time. The Department has further established seasons which prohibit fishing at certain times and has closed specific areas to protect necessary spawning escapement for these fish. The Department has also promulgated reasonable regulations for the fishing by Treaty Indians for steelhead in the Puyallup River.

IV.

Steelhead fishermen are required to obtain an annual license ($7.50) and an annual steelhead punchcard ($2.00) with limited exceptions. Treaty Indians fishing within their ceded areas are not required to pay a fee and obtain a license. There is no discrimination or exclusion from their participation in the hook and line fishery for steelhead. The hunting and fishing license fees collected by the Department of Game are placed in the

state game fund and cannot be used for any purpose other than "the protection, propagation and restoration of wildlife and game and the expenses of administration of the department." These fees provide 75% - 80% of the operating funds of the Department of Game.

V.

Steelhead which is an anadromous Rainbow trout, naturally spawn in fresh water streams and rivers, including the Puyallup River. The vast majority of naturally propagated steelhead, two years after having been spawned in fresh water, migrate to salt water. Little is known of the life cycle of steelhead while in saltwater. Only approximately 10% of the migrating steelhead smolts return as adult steelhead to the fresh water of their origin, and the majority do so after two years in saltwater. All but a small percentage of the returning steelhead die following the spawning process in fresh water.

VI.

A native or natural run of steelhead requires that approximately 50% of the steelhead entering the river be available for spawning in order to replenish and perpetuate the steelhead run in the

watershed. Thus, in the Puyallup watershed the harvest or catch of native steelhead should not in the interest of conservation exceed 50% of the returning adult native steelhead.

VII.

A hook and line fishery for steelhead is relatively inefficient and thus the inefficiency of the fishery permits an adequate escapement of steelhead for spawning purposes which are necessary for conservation. The hook and line fishery does not require active daily management by a regulatory agency in order to conserve and protect the steelhead fishery.

VIII.

A net fishery in fresh water is an efficient means of harvesting steelhead and the efficiency of the fishing gear can result in the over-harvesting of steelhead, thus reducing the number of steelhead which are available for spawning purposes to less than that necessary for conservation. This fishery is subject to regulation by the Department of Game or this Court for the purposes of conservation and allocation.

IX.

The Department of Game has engaged for a number of years in a substantial hatchery program to enhance and increase the production of steelhead throughout the state of Washington. The hatchery program involves some 18 hatcheries and 9 rearing ponds with a capital replacement value of $33,652,241, and an annual operational cost (for the fiscal year July 1, 1972 to June 30, 1973) of $1,636,247. The Department of Game's program has an annual capacity of approximately 5,000,000 winter and summer run steelhead smolts per year. A smolt is a steelhead which has reached the stage of its development that it is ready to commence the migration to salt water and is normally 6-8" in length. The smolt are planted in rivers and streams throughout the state by this Department.

X.

The Department of Game commenced planting hatchery steelhead in the Puyallup River in 1933. All of the hatchery steelhead being planted in the Puyallup River are secured from a nearby state hatchery. The operation of this Department supplies these steelhead is virtually entirely financed from funds received from the sale of licenses and punch cards

to sports fishermen. Since 1963, the number of steelhead smolt planted in the Puyallup River has varied from a low of 57,000 to a high of 124,000, and in recent years the plants have been 75,000 and 68,000. The rate of return of adult steelhead from salt water to the fresh water or origin varies, but generally is approximately 10% of the native and hatchery smolts.

The hatchery smolts when planted by the Department in the Puyallup watershed are 6-8" in length, and their planting coincides with the natural outward migration of steelhead smolts. The hatchery-planted smolts spend very little time in the fresh water, normally not exceeding one week in the watershed.

XI.

The physical characteristics of the adult native steelhead and the adult hatchery steelhead are virtually the same. The adult hatchery steelhead enter the Puyallup River on their upstream migration in larger numbers than do the native steelhead early in the fishing season (i.e., December, January). Conversely, the adult native steelhead compose a higher proportion of the total run that occurs during the months of February and March. The hatchery-reared steelhead

are identifiable by dorsal fin damage and the growth rings on the fish scales. Creel censuses have been made to determine the percentage of hatchery steelhead in the Puyallup River for the 1962-1963, 1971-1972, and 1972-1973 fishing seasons. The percentage of hatchery adult steelhead to the total steelhead run has slight variations from year to year, but the censuses have established that slightly in excess of 50% of the recent steelhead runs in the Puyallup River consist of hatchery adult steelhead.

XII.

The annual adult steelhead run in the Puyallup River varies from year to year, but over a ten-year period, it has been relatively constant with the exception of a decline in the last two years. In the period from 1954-1963 the combined sports and Indian fishery caught a total of 147, 155 steelhead, or an average of 14,715 per year. Since the steelhead catch reflect 50% of the total run, this establishes that the Puyallup River will support an average yearly run of combined natural and hatchery propagated steelhead of 29,430. For the ten-year period from 1964 through 1973, the sports and Indian fishery caught a total of 120, 980 steelhead; however, the Indian catch statistics for that period are incomplete. On the basis of the 1954-63 steelhead run

sizes which are slightly larger than the more current statistics, the average annual run of steelhead consists of 14,715 hatchery fish and 14,715 natural steelhead. It is necessary for conservation to have a 50% escapement of the natural adult steelhead run. Thus, the average is 7,357 harvestable natural adult steelhead in the Puyallup River on an annual basis. The annual planting of steelhead smolt by the Department of Game permits a full 100% harvest of the hatchery-reared steelhead since the planting substitutes what would otherwise be necessary for spawning purposes.

XIII.

At the negotiations at the Treaty of Medicine Creek, Governor Stevens, on behalf of the United States government, advised the Indians that white citizens would come to Western Washington to build mills, make homes and engage in fishing, and the government wanted the Indians to learn to farm and have their children attend school, and the intention was to integrate the Indians into a pattern of life different from that they had followed in past generations, and that these plans were satisfactory to both parties.

XIV.

The purpose expressed by negotiators for the Treaty of Medicine Creek for the inclusion of the provision relating to Indian fishing rights in Article III was to allow the Indians to fish at all accustomed places since this would not interfere with the rights of citizens and was necessary for the Indians to obtain a subsistence.

XV.

There are presently 20 full time Puyallup tribal treaty fishermen, 20 part time fishermen, and an additional 20 who occasionally participate in the fishery. The Indian net fishery is for personal and commercial purposes and provides income for tribal members. The majority of this income is from salmon fishery. Income from steelhead fishery is very limited.

XVI.

This Court in the first trial of this matter concluded that the Puyallup Indian Reservation no longer exists. The United States Supreme Court, 391 U.S. 392, 395, note 1, specifically reserved ruling on that question. Subsequently, in Settacum v. Washington, 414 U.S. 1,

the United States Supreme Court vacated a judgment of the Washington State Supreme Court that the Puyallup Reservation had ceased to exist. More recently, the United States Court of Appeals for the Ninth Circuit in United States v. State of Washington, 496 F.2d 620 (cert. den. 47 L.ed. 2d 307), decided that the Puyallup Indian Reservation had not been terminated and extinguished. It is assumed, therefore, that this Reservation has not been extinguished and still exists. The extent of this existence has not been judicially determined.

XVII.

The Puyallup Reservation includes approximately a 7-mile stretch of the Puyallup River commencing near the mouth of the river. There are a number of fishing areas on the Puyallup River and its tributaries which are upstream from the reservation area.

XVIII.

The Puyallup Tribe currently intends to concentrate its fishing for steelhead within the boundaries of the reservation and have indicated an intention to take 90% of their steelhead harvest within that area.

XIX.

During the 1973-74 steelhead fishing season of 121 days, a creel census was taken on 57 days, interviewing fishermen on the Puyallup River. On those days 3,243 persons were observed engaging in the hook and line fishery on the Puyallup River. 5,171 persons engage in the hook and line fishery on the Puyallup River during an entire year.

XX.

The Department of Game promptly following the United States Supreme Court decision, 414 U.S. 44 (November 19, 1973) adopted regulations effective December 1, 1973, providing for gillnet fishing by Puyallup Tribal members on the Puyallup River.

XXI.

The Department of Game in order to carry out its management responsibilities in the interest of conservation of the steelhead resources must know the numbers and names of Puyallup tribal fishermen so that only such eligible tribal fishermen will be permitted to fish for steelhead by means other than a hook and line fishery.

XXII.

A fair apportionment or allocation of the harvestable natural adult steelhead on the Puyallup River is to permit the Puyallup Treaty Indians to have 45% of the harvestable natural steelhead in the Puyallup River, or an annual catch of 3,310 provided that the annual runs continue to be in approximately the same magnitude as that reflected in the Finding of Fact No. 12.

CONCLUSIONS OF LAW

I.

The court has jurisdiction over the parties and the subject matter in this proceeding.

II.

The Department of Game of the State of Washington has the authority to manage and regulate the steelhead resource of the State of Washington. The Game Department's program is designed to preserve and increase the production of steelhead.

III.

The Department of Game's and the State of Washington's regulation and management of the hook and line fishery

for steelhead in the Puyallup River does not discriminate against Puyallup tribal members.

IV.

The Puyallup Tribe is a beneficiary of the Treaty of Medicine Creek, 10 Stat. 1132, and its tribal members are entitled to treaty fishing rights at usual and accustomed areas, which include the Puyallup watershed. The treaty right to fish is in common with all the citizens of the territory and is not an exclusive right. The determination of the extent of this right within the boundary of the former Puyallup Indian reservation is not now before this court. The Treaty did provide that within these boundaries as originally described and established, these Indians were entitled to exclusive possession. However, this exclusive right of possession did not convey to these Indians ownership of all fish that entered the Puyallup River and were bound upstream to spawn, or were bound downstream to migrate.

Both parties intended that each would have a fair portion of the fish in the river. Neither party had the right to monopolize these fish nor damage the natural run in this river. Both parties intended that they would conduct

their own fishery so that the natural fish run would not be progressively depleted.

V.

The language "in common" in the Treaty of Medicine Creek means that no one has any individual rights greater than another's, a right in common belongs to no one man but belongs equally to more than one or to many indefinitely, as: life and sense are common to man and beast, or: the common privilege of citizens, the common wants of man. That is, a right in common belongs to the public; it has no separate owner.

VI.

The Indian treaty fishing rights do not extend to steelhead which are planted in the Puyallup River by the Department of Game under its hatchery program.

VII.

The state, through its Department of Game, or this Court has the authority to regulate the fishing activities of Puyallup tribal members when such regulations are necessary for the purposes of conservation.

VIII.

Conservation means the wise use of the resource and in the management of steelhead there must be necessary escapement for needed spawning to insure the perpetuation of the resource. The manner of fishing must be such that it can be controlled so that it does not impair or damage the necessary spawning escapement and further, the manner of fishing itself must not be destructive.

IX.

The fishing activities of the defendant tribe and its members, if allowed to proceed unrestrained, could result in the destruction or serious impairment of the steelhead fish runs in the Puyallup River. Once a run is destroyed it is generally impossible to reestablish. Such depletion would damage future treaty fishing rights of future Puyallup Indians.

X.

The treaty does not create or reserve for the Indians any property interest in the resource but does permit tribal members to have a fair portion of the natural adult steelhead entering the Puyallup River. A fair portion of the natural steelhead run is 45% of the

harvestable portion of the natural steelhead run in the Puyallup River in view of the number of Indian fishermen, the purpose of their fishery, the number of sports fishermen, the catch limitations, the locations of the fishing areas and the availability of harvestable fish.

XI.

The treaty does not authorize the Puyallup Indians to conduct their fishery in such a manner as to damage or destroy the fishery or to pre-empt completely others from fishing in common upriver even by fishing activities which occur within the boundaries of the reservation. This court has jurisdiction to exercise limitations upon the reservation Indian fishery to the extent that it is necessary to protect the passage of fish to upstream fishing and spawning areas.

XII.

The Puyallup tribal members by virtue of the treaty can utilize fishing gear which is prohibited to other citizens of the state for steelhead fishing, but the use of such gear is subject to the regulatory authority of the State of Washington through the Department of Game in the interest of conservation.

DONE IN OPEN COURT this 8 day of April, 1975.

/s/ W. L. Brown, Jr.
J U D G E

APPENDIX E

IN THE SUPERIOR COURT

OF THE STATE OF WASHINGTON

IN AND FOR PIERCE COUNTY

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, Plaintiff, vs. PUYALLUP TRIBE, INC., Defendant.	No. 158069 ORDER AND JUDGMENT

THIS MATTER came on regularly for trial commencing June 3, 1974, before the undersigned judge of the above-entitled court pursuant to an amended petition for declaratory relief pursuant to the remand of the Supreme Court of the State of Washington in accordance with the United States Supreme Court decision in this matter, 414 U.S. 44, and the state Supreme Court decision in 80 Wn. 2d 561, 497 P.2d 171. This action was previously considered by the Washington State Supreme Court in 70 Wn.2d 245, 422, P.2d 754, and by the

United States Supreme Court in 391 U.S. 392. The plaintiffs were represented by the Honorable Slade Gorton, Attorney General of the State of Washington, through Edward B. Mackie, Deputy Attorney General; the intervenor-plaintiff Northwest Steelheaders Council of Trout Unlimited and Gary Ellis, were represented by Don S. Willner and Vincent R. Larson; the intervenor-plaintiff Western Steelheaders, Inc. were represented by James Tannesen; the defendant Puyallup Tribe was represented by the Honorable Stan Pitkin, United States Attorney for the Western District of Washington, Thomas P. Giere, Assistant United States Attorney, George D. Dysart, Assistant Regional Solicitor, United States Department of Interior, and William H. Rodgers, Jr.; and Mr. John Sennhauser appeared for defendant Ramona Bennett, chairperson of the Puyallup Tribal Council; and the court having heard the evidence and arguments of counsel and being fully advised in the premises and having filed a memorandum opinion, and having entered its findings of fact and conclusions of law, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That the findings of fact and conclusions of law entered in this case upon this date are incorporated herein by reference as though fully set forth and are

declared to govern the rights, status and other legal relationships between the parties.

That the Department of Game of the State of Washington has the authority to regulate the off-reservation fishing activities of the Puyallup tribal members when such regulations are necessary for the purposes of conservation.

That within the boundaries of the Puyallup Indian Reservation this Court has jurisdiction and authority to allocate fishery of both hatchery and naturally propogated steelhead between Treaty and Non-Treaty parties.

That duly enrolled members of the Puyallup Tribe are entitled to catch 45% of the harvestable natural steelhead run in the Puyallup River each year, but this catch cannot exceed 3,280 steelhead in any one year; that these Indians are authorized to fish with nets of their own choosing and to sell their steelhead catch commercially;

That these Indians have no Treaty right to fish for hatchery propogated [sic] steelhead planted by the State of Washington, Department of Game, in the Puyallup River. That in reference to these steelhead these Indians must fish in the

same manner as any other citizen of this state and must obey all state game regulations regarding the manner of fishing and the size of the catch. Provided these Indians need not be licensed by the State of Washington to fish for these steelhead.

That the defendant Puyallup Tribe shall file with the court within thirty days of this judgment of properly authenticated roll of Puyallup tribal members who are authorized to exercise treaty fishing rights in the Puyallup River watershed.

That the defendant Puyallup Tribe shall on a weekly basis during the steelhead fishing season report to the court and the plaintiff Department of Game the total number of steelhead caught by tribal members during that weekly period.

That the Department of Game of the State of Washington shall continue the planting of steelhead smolts in the Puyallup River.

That the court will retain continuing jurisdiction for the purposes of regulating, if necessary, the Indian fishery within the boundaries of the Puyallup Reservation and further for making such adjustments as appear appropriate in the

number of steelhead allocated for treaty fishermen.

DONE IN OPEN COURT this 8 day of April, 1975.

/s/ W. L. Brown, Jr.
J U D G E

Supreme Court, U. S.
FILED
JAN 21 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-423

PUYALLUP TRIBE, INC. AND RAMONA BENNETT, *Petitioners*

—v.—

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON

On Writ of Certiorari to the Supreme Court of the State of Washington

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Petition for Certiorari Filed September 22, 1976
Certiorari Granted November 29, 1976

Supreme Court of the United States

October Term, 1976

No. 76-423

Puyallup Tribe, Inc. and Ramona Bennett, *Petitioners*

—v.—

Department of Game of the State of Washington

On Writ of Certiorari to the Supreme Court of the State of Washington

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* The Memorandum Opinion, Findings of Fact and Conclusions of Law, Judgment and Order of the Trial Court, and the opinion of the Supreme Court of the State of Washington are contained in the Petition for Certiorari.

RELEVANT DOCKET ENTRIES

SUPERIOR COURT OF PIERCE COUNTY

No. 158069

DEPARTMENT OF GAME

v.

PUYALLUP TRIBE, INC.

Date	Proceedings.
1974	
Jan 3	—Pet. for Declaratory Relief
Jan 10	—Amended Petition for Declaratory Relief
Jan 11	—Letter Order Remand
Jan 14	—Set for Trial June 3, 1974
Apr 11	—Complt of Intervenor-Plt N.W. Steelheaders Motion for Intervention
May 1	—[Illegible] intervention
May 2	—Letter
May 3	—Mot. to Intervene Complaint of Western Steelheaders
May 22	—Motion & Aff. for Cont.
May 23	—Order
May 31	—Deft. First Set of Interog. to Dept Game Deft. Interog to Pet. Steelheaders
Jul 24	—Memo of law in response to J Brown letter
Sep 20	—Letter
Oct 9	—[Illegible] response to Cts letter for Clarification

Date	Proceedings.
Dec 23	Memo. J 333 P 472 Trial Record
	Statement of Fact 1, 2, 3
	Memorandum Decision
Dec 30	Letter & copies
	Letter & copies
	Letter & copies
	Motion for reconsideration
Jun 3*	Subpoena Duces Tecum (2)
Jun 10*	Order Granting Leave to Intervene
1975	
Apr 9	Findings of Fact & concl.
	Judgment & order
Apr 10	Letter
Apr 28	Notice of Appeal
May 6	Notice of Cross Appeal
1976	
Feb 3	Temp Rest Order—etc 594-1-428
Feb 6	Closure Order
	Memo. J 333 P 605
Feb 27	Jdgmt for Contempt
Dec 14**	Temp Rest Order
Dec 22**	Closure Order

* Indicates material out of order in original.
** Occurring after grant of certiorari.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

No. 158069

DEPARTMENT OF GAME of the STATE OF WASHINGTON,
Plaintiff,

vs.

PUYALLUP TRIBE, INC., ET AL., *Defendants*.

Amended Petition for Declaratory Relief Pursuant to Remand

COMES now the plaintiff State of Washington Department of Game by and through its Attorney General Slade Gorton and Assistant Attorneys General Joseph Lawrence Coniff, Jr., and James M. Johnson, and for a claim against defendants state:

I.

On November 19, 1973, the Supreme Court of the United States entered its opinion in *Department of Game of Washington vs. Puyallup Tribe, Inc., Et al.* (copy of which is annexed hereto and marked as Exhibit "A"). On December 18, 1973, the Clerk of the Supreme Court of the United States caused to be issued a Mandate to the Supreme Court of Washington (copy of which is annexed hereto and marked as Exhibit "B'). On December 27, 1973, the Honorable Frank Hale, Chief Justice of the Supreme Court of the State of Washington entered an Order of Remand in Pierce County Cause No. 158069 (copy of which is annexed hereto and marked as Exhibit "C").

II.

The opinion of the United States Supreme Court (Exhibit "A") reversed the judgment of the Supreme Court

of the State of Washington "insofar as it treats the steelhead problem" and "remand(ed) the case for proceedings not inconsistent with this opinion." The Mandate from the Clerk of the United States Supreme Court (Exhibit "B") requires that the Courts of the State of Washington conduct proceedings in this cause in conformity with the opinion of the United States Supreme Court. The Mandate has been implemented by the Order of Remand of Chief Justice Hale (Exhibit "C") which requires this Court to "hold further proceedings consistent with the opinion and mandate of the Supreme Court of the United States."

III.

On November 29, 1973, the Game Commission of the State of Washington in response to these opinions and orders promulgated, pursuant to the opinion of the Supreme Court of the United States, certain rules and regulations pertaining to the taking of steelhead by members of the Puyallup Tribe of Indians on the Puyallup River, which regulations were to be effective December 1, 1973, to January 17, 1974. Copies of said rules and regulations are attached hereto and marked as Exhibit "D."

On January 7, 1974, the Game Commission again considered the treaty Indian gill net fishing seasons set at their November 29, 1973, meeting, but the Commission agreed with the recommendations of staff of the Department of Game that those regulations should not be extended past their set closing date, i.e., January 17, 1974. The Commission, however, did establish a treaty Indian gill net fishing season for steelhead on the Skagit River, which season is to be effective January 13, 1974, to February 13, 1974. A copy of this season is attached hereto and marked Exhibit "E".

Defendant Puyallup Indians have disregarded and violated rules and regulations by unrestricted commercial net

fishing for steelhead trout in the Puyallup River since rendition of the United States Supreme Court's opinion issued on November 19, 1973. Plaintiff Department of Game has no adequate remedy at law and the public interest in the valuable steelhead resource of the Puyallup River will suffer permanent and irreparable injury from the actions of the defendants as set forth above unless a judgment is entered confirming the right of the Washington Department of Game to promulgate and enforce reasonable rules and regulations pertaining to the Puyallup Indian net fisheries on Commencement Bay, the Puyallup River and its tributaries.

IV.

Defendants Puyallup Tribe, Inc., Et al., have been and threaten to continue to engage in unregulated commercial net fishing in the Puyallup River for steelhead trout. Such unrestricted netting activities are inconsistent with the opinion of the Supreme Court of the United States issued November 19, 1973 (Exhibit "A").

V.

An emergency presently exists requiring that this cause be set down for hearing at the earliest practicable date because serious damage is presently occurring to the steelhead runs of the Puyallup River and there is a likelihood of violence and civil disorder resulting from the present confusion as to the respective legal rights and responsibilities of the plaintiff and defendants in this cause.

WHEREFORE Washington Department of Game prays that this Court declare that Game possesses the sole and exclusive authority to promulgate and enforce reasonable rules and regulations for the taking of steelhead trout by members of the Puyallup Tribe of Indians in Commencement Bay, the Puyallup River and its tributaries.

FURTHER, that this Court set this proceeding down for hearing at the earliest practicable date at which time trial should be had on the merits concerning the issues remaining in this proceeding.

FURTHER, that the plaintiff Washington Department of Game have judgment against all defendants in accordance with the allegations of this petition and for such other and further relief as to the Court may seem just and reasonable.

DATED this 9th day of January, 1974.

Respectfully submitted:

SLADE GORTON
Attorney General

/s/ JOSEPH LAWRENCE CONIFF, JR.
Joseph Lawrence Coniff, Jr.
Assistant Attorney General

/s/ JAMES M. JOHNSON
James M. Johnson
Assistant Attorney General

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

No. 158069

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,
Plaintiff,

NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED and GARY ELLIS, *Intervenor-Plaintiffs*,

v.

PUYALLUP TRIBE, INC., et al, *Defendants*.

Complaint of Intervenor-Plaintiffs Northwest Steelheaders Council of Trout Unlimited and Gary Ellis

Intervenor-Plaintiffs allege:

I

Trout Unlimited is a nationwide nonprofit corporation incorporated in Michigan and authorized to do business in the State of Washington with over 18,000 members throughout the United States and has as one of its primary purposes, the conservation of fish.

II

Northwest Steelheaders Council of Trout Unlimited is the regional council of Trout Unlimited in the Pacific Northwest and has over 5,000 members in the Pacific Northwest, including about 3,000 members in the State of Washington of whom about 500 live in Pierce County, Washington. Chapters are located in Tacoma and Puyallup in Pierce County and other chapters are located in Bellevue, Bremerton, Seattle, Everett, Aberdeen, Spokane, Chehalis, Hazel Dell, Longview Kelso, Sunnyside, North Seattle, Bothell, Olympia, Port Angeles, Mt. Vernon, Lynn-

wood, Federal Way, Renton, Wenatchee, Vancouver, Camas-Washougal and Yakima.

III

Most of the members of the Tacoma and Puyallup chapters are licensed sports fishermen in the State of Washington, have paid $2.00 each for punch cards entitling them to fish for steelhead trout in the State of Washington, and do regularly fish for steelhead trout in Commencement Bay and the Puyallup River and its tributaries (all referred to herein as the Puyallup River system in Pierce County, Washington.)

IV

Steelhead trout is a game fish under the laws of the State of Washington.

V

Gary Ellis is a citizen of the State of Washington, a resident of the City of Tacoma in Pierce County, Washington, over the age of 21 years, and the Washington State president of the Northwest Steelheaders Council of Trout Unlimited. He is a steelhead fisherman, holds a valid current license from the State of Washington permitting him to engage in this activity, and customarily fishes for steelhead trout in the Puyallup River system.

VI

Approximately 12,000 to 14,000 steelhead trout are caught by licensed sports fishermen in the Puyallup River system each year and a significant number are caught by members of the Northwest Steelheaders Council of Trout Unlimited, especially members of the Tacoma and Puyallup chapters. Sports fishermen retain steelhead trout that they catch for their own use. If the steelhead trout caught by sports fishermen on the Puyallup River system each year were sold, the value of this fish would be about $130,000.

VII

Most of the steelhead trout in the Puyallup River system come from hatcheries. Most of the cost of the hatcheries program is financed by the license fees of sports fishermen, including the license fees of members of Northwest Steelheaders Council of Trout Unlimited.

VIII

The decision of the United States Supreme Court in this case entered November 19, 1973, provides that members of Puyallup Tribe, Inc. have a right to fish commercially for steelhead trout in the Puyallup River system and the Supreme Court directs that the matter be remanded to this court to apportion the steelhead trout in the Puyallup River system between Puyallup Tribe, Inc. and the sports fishermen, to find whether the Indian treaty fishing right extends to the hatchery fish paid for by the sportsmen, and to determine a reasonable program of regulation by the Department of Game of the State of Washington consistent with the decision.

IX

Reasonable regulation of the catch of steelhead trout and the time and method of taking in the Puyallup River system by the Department of Game of the State of Washington after consultation with Puyallup Tribe, Inc. and other interested parties is necessary for the conservation of the resource.

X

Sports fishermen are entitled to those steelhead trout in the Puyallup River system originating in the hatcheries because the hatchery program is funded by sportsmen's license fees and excise taxes paid by sportsmen on fishing equipment.

XI

Puyallup Tribe, Inc. and its members are entitled to such portion of the natural run of steelhead trout in the Puyallup River system as this Court should deem just and equitable.

WHEREFORE, Intervenor-Plaintiffs pray for a decree of this court providing as follows:

1. The Department of Game of the State of Washington after consultation with Puyallup Tribe, Inc. and other interested parties is directed to establish reasonable regulation of the catch of steelhead trout and the time and method of taking in the Puyallup River system.

2. Sports fishermen are entitled to those steelhead trout in the Puyallup River system originating in the hatcheries.

3. Puyallup Tribe, Inc. is entitled to such portion of the natural run of steelhead trout in the Puyallup River system as this Court should deem just and equitable.

4. Such other relief as this court should deem just and equitable.

RIDDELL, WILLIAMS, VOORHEES, IVIE & BULLITT

By _____
VINCENT R. LARSON

WILLNER, BENNETT, MEYERS, RIGGS & SKABSTAD

By _____
DON S. WILLNER
Attorneys for Intervenor-Plaintiffs Northwest Steelheaders Council of Trout Unlimited and Gary Ellis

(April, 1974)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

No. 158069

DEPARTMENT OF GAME of the STATE OF WASHINGTON, et al,
Plaintiffs,

vs.

PUYALLUP TRIBE, INC., et al, *Defendants.*

Answer

COMES NOW the defendant Puyallup Indian Tribe, and for answer to the amended petition of the Department of Game, admits, denies and alleges as follows:

I

The defendant admits paragraph I of the amended petition.

II

The defendant admits paragraph II of the amended petition.

III

Answering paragraph III of the amended petition, the defendant admits subparagraphs one and two thereof. The defendant denies each and every other allegation in paragraph III.

IV

The defendant denies paragraph IV of the amended petition.

V

The defendant denies paragraph V of the amended petition.

By way of answer to the complaint of the intervening plaintiffs Northwest Steelheaders Council, the defendant Puyallup Indian Tribe admits, denies and alleges as follows:

I

Defendant is without knowledge or information sufficient to form a belief as to the veracity of paragraph I of the complaint and therefore denies the same.

II

Defendant is without knowledge or information sufficient to form a belief as to the veracity of paragraph II of the complaint and therefore denies the same.

III

The defendant is without knowledge or information sufficient to form a belief as to the licensing status and fishing habits of the intervening plaintiffs' Tacoma and Puyallup members, and therefore denies the same. The allegation that the intervening paintiffs' members are entitled to fish for steelhead is a conclusion of law requiring no answer.

IV

The defendant admits paragraph IV of the complaint insofar as stated, but adds that the laws of the State of Washington are governed by applicable judicial decisions and federal constitutional and treaty provisions.

V

The defendant is without knowledge or information sufficient to form a belief as to the veracity of paragraph V of the complaint and therefore denies the same.

VI

The defendant is without knowledge or information sufficient to form a belief as to the veracity of paragraph VI of the complaint and therefore denies the same.

VII

The defendant is without knowledge or information sufficient to form a belief as to the veracity of paragraph VII of the complaint and therefore denies the same; and alleges that the presence of the steelhead trout in the Puyallup River system antedates the State Hatcheries Program and the Northwest Steelheaders Council.

VIII

As an attempt to paraphrase the November 19, 1973, decision of the Supreme Court of the United States, paragraph VIII of the complaint consists of conclusions of law which require no answer. However, said paraphrase is incorrect and defendants deny such allegations.

IX

The defendant denies paragraph IX of the complaint.

X

The defendant denies paragraph X of the complaint.

XI

Paragraph XI of the complaint is a prayer for relief which requires no answer.

By way of answer to the complaint of the intervening plaintiffs Western Steelheaders, Inc., the defendant Puyallup Indian Tribe admits, denies and alleges as follows:

FIRST ALLEGED CAUSE OF ACTION

I

The defendant is without knowledge or information sufficient to form a belief as to the veracity of paragraph I of the complaint and therefore denies the same.

II

The defendant is without knowledge or information sufficient to form a belief as to the veracity of paragraph II of the complaint and therefore denies the same.

III

The defendant is without knowledge or information sufficient to form a belief as to the veracity of paragraph III of the complaint and therefore denies the same.

IV

As an attempt to paraphrase the November 19, 1973 decision of the Supreme Court of the United States, paragraph IV of the complaint consists of conclusions of law requiring no answer. However, said paraphrase is incorrect and defendants deny such allegations.

V

The defendant denies paragraph V of the complaint.

SECOND AND THIRD ALLEGED CAUSES OF ACTION

VI

The second and third claims of the intervenor Western Steelheaders, Inc. are directed to the State of Washington, Department of Game and require no response from this defendant beyond the existence of this defendant's rights reserved in the Treaty of Medicine Creek.

By way of further answer and defense to the amended petition of the State of Washington, Department of Game and the complaint of the intervening plaintiffs, the defendant Puyallup Indian Tribe alleges as follows:

AFFIRMATIVE DEFENSE I

On April 30, 1974, there was entered in the United States Court of Appeals for the Ninth Circuit a decision in *United States* v. *State of Washington,* No. 73-1793, a copy of which is attached hereto as defendant's Exhibit 1. This decision affirms the sole and exclusive right of the Puyallup Indian Tribe, under the Treaty of Medicine Creek, to take fish, including steelhead, from within the exterior boundaries of the Puyallup Indian Reservation. This decision is binding and controlling on plaintiff and the intervening plaintiffs and renders moot their claims for relief seeking to adjudicate defendant's rights to steelhead trout in the Puyallup River System taken from on-reservation sites.

AFFIRMATIVE DEFENSE II

On February 12, 1974, there was entered in the United States District Court for the Western District of Washington, a decision in the case of *United States of America, et al.* v. *State of Washington, et al.,* No. 9213, a copy of which is attached hereto as defendant's Exhibit 2. This decision affirms the right of the Puyallup Indian Tribe, under the Treaty of Medicine Creek, to share in the taking of 50% of the harvestable steelhead from the affected waters, exclusive of Puyallup tribal needs and on-reservation fishing. The decision determined that the usual and accustomed fishing places of the Puyallup Indian Tribe at the time of the Medicine Creek Treaty included the marine areas around Vashon Island and adjacent portions of Puget Sound, Commencement Bay, the Puyallup River and its tributaries, as well as other creeks adjacent to, but not

tributaries of the Puyallup River. The decision in *United States of America, et al.* v. *State of Washington*, and other federal law and regulations, including 25 C.F.R., Part 256, effectively preempt the power of state agencies to regulate the defendant's treaty fishing rights.

Affirmative Defense III

The precise share of harvestable steelhead which this defendant is entitled to take at its usual and accustomed fishing grounds and stations during a particular run or season cannot be determined without reference to similar rights possessed by other Indian tribes identified in defendant's Exhibit 2. This question is part of the litigation continuing in the United States District Court for the Western District of Washington. The range of off-reservation treaty fishing rights mentioned in the immediately preceding paragraph was not before the Supreme Court of the United States under the most recent petition for certiorari in the instant case. Other tribes would be indispensable parties to litigation seeking to decree the precise share of harvestable steelhead to which this defendant is entitled.

Affirmative Defense IV

For the reasons stated under Affirmative Defenses II and III above, and for additional reasons of economy of time and effort and the need for a definitive resolution in a single forum, the court in this case, as a matter of comity, should defer to the continuing federal litigation.

Affirmative Defense V

Within the limitations of the continuing federal litigation, and without reference to its on-reservation fishing rights, the Puyallup Indian Tribe has the right to take up to 50% of the harvestable steelhead from its usual and

accustomed fishing grounds and stations. Evidence adduced in this Court on prior hearings and, therefore, the law of this case, reflects that the Puyallup steelhead hatchery program operates to mitigate the loss of run-size of native steelhead from adverse environmental factors. There is no legal distinction to be drawn between the defendant's rights to the natural steelhead run and the run produced in Washington State hatcheries.

Affirmative Defense VI

The steelhead run on the Puyallup River has been adversely affected by a number of adverse environmental factors, including water pollution, damming, and other interference with waterways. Plaintiff and other agencies of state government have failed to take effective action to prevent the depletion of the Puyallup steelhead run by these adverse environmental factors. It is therefore inequitable and discriminatory for plaintiff to seek equitable relief against the defendant whose rights have been adversely affected by plaintiff's own action.

Additional Defense

The amended petition and the complaints of the intervening plaintiffs fail to state a claim upon which relief can be granted against the defendant.

WHEREFORE, this defendant prays that the Court:

1. Deny the relief sought by the plaintiff in its amended petition;

2. Deny the relief sought by the intervening plaintiffs in their amended complaint; and

3. Declare the defendant's right to take up to 50% of the harvestable steelhead from its usual and accustomed fishing grounds and stations.

Dated this *21st* day of *March*, 1974.

STAN PITKIN
UNITED STATES ATTORNEY

/s/ THOMAS P. GIERE
Thomas P. Giere
ASSISTANT U.S. ATTORNEY

/s/ WILLIAM H. RODGERS, JR.
William H. Rodgers, Jr.
Attorney for the Puyallup Tribe

JOHN H. SENHAUSER
Attorney for Ramona Bennett

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

No. 158069

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,
Plaintiff,

NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED and GARY ELLIS, *Intervenor-Plaintiffs*,

WESTERN STEELHEADERS, INC., *Intervenor-Plaintiffs*,

vs.

PUYALLUP TRIBE, INC., et al, *Defendants*.

Statement of Facts

BE IT REMEMBERED, that the above-entitled and numbered cause came on for hearing Monday, June 3, 1974, before the HONORABLE WILLIAM L. BROWN, JUNIOR, at the County-City Building, Tacoma, Washington; the parties being represented by their respective counsel as follows:

SLADE GORTON, Attorney General, by EDWARD B. MACKIE, Deputy Attorney General, Temple of Justice, Office of the Attorney General, Olympia, Washington 98501, appearing on behalf of the Department of Game of the State of Washington, Plaintiff.

DON S. WILNER, 900 Corbett Building, Portland, Oregon 97204, appearing on behalf of Northwest Steelheaders Council of Trout Unlimited and Gary Ellis, Intervenor-Plaintiffs.

JAMES TANNESEN, of the firm of DAVIES & ROETCISOENDER, 3316 N. E. 125th Street, Seattle, Wash-

ington 98125, appearing on behalf of Western Steelheaders, Inc., Intervenor-Plaintiffs.

VINCENT R. LARSON, of the firm of RIDDELL, WILLIAMS, VOORHEES, IVIE & BULLITT, 4310 Seattle-First National Bank Building, Seattle, Washington 98154, appearing on behalf of Northwest Steelheaders Council of Trout Unlimited and Gary Ellis, Intervenor-Plaintiffs.

WILLIAM H. RODGERS, JUNIOR, Attorney-at-Law, 600 New Jersey Avenue, N.W., Washington, D.C. 2000, appearing on behalf of the Puyallup Tribe, Inc., et al, Defendants.

STAN PITKIN, United States Attorney, by THOMAS P. GIERE, Assistant United States Attorney, 1012 United States Courthouse, Seattle, Washington 98104, appearing on behalf of the Puyallup Tribe, Inc., et al, Defendants.

JOHN H. SENNHAUSER, Attorney-at-Law, 104½ Cherry Street, Seattle, Washington 98104, appearing on behalf of Ramona Bennett, Defendant.

GEORGE D. DYSART, Assistant Regional Solicitor, United States Department of the Interior, 1002 N. E. Holladay Street, P. O. Box 3621, Portland, Oregon 97208, appearing on behalf of the Puyallup Tribe, et al, Defendants.

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[20] MR. MACKIE: Excuse me. Your Honor, we take the position first, that we have to operate on the premise that there is a reservation unless the United States Supreme Court grants certiorari on that decision and reverses the same. And that that question can only be resolved by that format. And the failure to take certiorari or taking so failure to overturn the 9th Circuit the reservation is there and we must observe it. But what we are asking is, first, by this court to determine that there is a distinction in terms of the treat right between the natively propagated steelhead and those which are hatchery planted. Now, that concept, since we only have jurisdiction off-reservation—is only material to the off-reservation fishery. Our second issue that we want resolved is really more strictly a legal rather than a factual. It is simply a determination that the State in establishing the regulatory pattern for off-reservation [21] Indian Treaty fishing on the Puyallup can take cognizance of the catch which is made on the reservation area. Now, if the Supreme Court were to take certiorari and decide there is no reservation the second issue then would not be material. But we can't operate on that premise at this time so we need that resolved. And those two questions being resolved we then can contact the Tribe to determine the magnitude and the intensity of the fishing effort they intend to engage in on the reservation, and then second, if they intend to fish off-reservation, and if so, what is the nature of their intention, and taking then the resolution of the first two issues plus that the Department of Game can then establish regulatory patterns for the off-reservation fishing activity which would encompass the activity by the Puyallups.

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BY MR. WILLNER

[35] First of all, Your Honor, my clients were not parties to the decision before Judge Boldt. My clients, Northwest Steelheaders, were in that case—we filed an amicus brief and we were not parties. As a matter of fact, we have sought to get into that case and Judge Boldt has denied our right to get into that case and we certainly do not feel bound by a case that we tried to get into and he won't let us.

I would respectfully submit, however, that in connection with this issue that a fair reading of Justice Douglas' opinion, and it's a short opinion in Puyallup II, essentially

says that the Department of Game has the duty of regulating the fishery on the Puyallup River, both the Treaty Indian fishery of the Tribe and also the sports fishery, and the Department must [36] make certain decisions. It says the Department shall decide what formula, and the Court says what formula should be employed is not for us to propose; there are many variables: The number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook and line licenses issuable, the limits of the catch of each sports fisherman, duration of the season for sports fishermen and the like. The aim is to accommodate the rights of Indians under the Treaty and the rights of other people. I read that as an instruction by Judge Boldt that once this Court——

THE COURT: You said "Boldt."

MR. WILNER: By Justice Douglas, I'm sorry. I read that as instruction by Justice Douglas that once this Court has defined the open issues that the Department of Game then must do this. The reason why we would respectfully suggest that Judge Boldt's opinion though it may be a precedent that Your Honor might want to consider is by no means binding on this Court and we would suggest in this area it should be differed with because Judge Boldt says in his opinion that the Department of Game of the State of Washington does not have a right to regulate the Indian Treaty fishery once the Indian tribes qualify in ways that Judge Boldt prescribes. So, in our judgment we have a square conflict between the opinion of Justice [37] Douglas and the Supreme Court of the United States on the one hand and Judge Boldt on the other hand. The Supreme Court of the United States says the Department has a duty to regulate—the Department of Game, and Judge Boldt says the Department does not.

TESTIMONY OF CLIFFORD J. MILLENBACH, CALLED AS A WITNESS BY THE DEPARTMENT OF GAME

Direct Examination By Mr. Mackie

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[104] Q. Now, the steelhead smolts which you raise in the hatchery, when do you normally plant these in the watershed? A. They are normally planted to mesh with the natural [105] cycle of the fish which is from about April 15th to May 15th. We reason that if this was the normal period for steelhead to migrate to salt water that a hatchery program, based on the natural behavior pattern of a steelhead, would have the highest chance for success. We know, too, the planting of smolts at the time they are moving to salt water, that they spend a very short time in the stream system, basically using it only as a highway to the ocean. Because of this, then, in our view there is no impact as far as the other salmonoid or other steelhead or natural steelhead that may be in the stream.

Q. How long are the smolts kept in the hatchery? A. Our program is designed to produce a smolt within one year. In the early work, particularly with summer steelhead, we were unable to do this and we retained some groups of fish for two years to make sure that they had attained smolt size in time for the spring migration to the ocean.

Q. How do the hatchery one-year smolts compare with the two-year smolts of the native fish? A. There seems to be generally just a little larger size to the hatchery fish as compared to the wild smolts. We find, of course, some variance in the wild smolts too. Those that would stay in fresh water for three years, for example—a small percentage of the population—could average nine or ten inches in length. But the normal for the two-year residency in fresh [106] water on the part of the wild or native fish is to be about six to eight inches in length. Our hatchery fish on the average are closer to eight inches, so generally are just slightly larger than the wild smolts.

Q. How does the life cycle of the hatchery fish compare with the life cycle——

THE COURT: Excuse me. How do you account for that?

THE WITNESS: Because in the hatchery of course the fish is subjected to artificial feeding and in many of our hatcheries we have advantageous water temperatures. The Game Department has utilized springs for many of its hatcheries which is a higher temperature regime throughout the year and the temperature is a very important controlling factor in growth rates. The streams which drop in temperature in the wintertime, the growth also is reduced in the wintertime. It is because primarily of the suitable water temperatures we have in the hatcheries and the improved diets, artificial feeding, that we are able to produce a smolt in one year as compared to two years for a native fish in the wild.

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[109] Q. What's the approximate percentage for the return of the hatchery smolts that were planted which in turn return as adults? A. We have determined this through numerous experiments and have had results all the way from zero to fifteen percent. However, the common return rate is at about the ten percent level.

Q. When the hatchery stock return as adults to the watershed do they return to the hatchery? A. One of the key factors in our steelhead program is that steelhead will return to the stream in which they are planted. In other words, if we were to hatch the steelhead and rear them at the Puyallup Hatchery but were to plant the smolts in the Green River, the smolts, the adults from that plant would return to the Green River and not to the Puyallup River. This is one of the real important factors of our steelhead programs in that the homey instinct seems to relate to the area in which the smolt occurs when it starts its migration to sea.

Q. When the hatchery adult steelhead return to the watershed do they spawn in like manner to those of the native run? A. They react essentially the same as a wild steelhead, however, we do note that there is some difference in timing.

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[113] Q. If I understand your testimony correctly, are you saying—do we take any steelhead eggs from the Puyallup River for purposes of the hatcheries? A. No, we do not.

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[127] Q. Mr. Millenbach, is the White River that you are describing, is that historically part of the Puyallup River system? A. The records indicate that the White River in 1906 and prior to that time, or prior to 1906, flowed into the Green River rather than into the Puyallup; and that as a result of floods—high runoff—it broke a channel into the Puyallup River system and efforts subsequent to that in terms of diking and so forth have retained the White River into the Puyallup River system which was contrary to its original water course.

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[130] Q. How many hatcheries does the Department of Game currently operate which are involved in the propagation of steelhead? A. We operate about 18 hatcheries that are used either wholly or in part for steelhead production.

Q. Do you also operate some rearing ponds in conjunction with the steelhead program? A. Yes, there are nine rearing ponds used for steelhead production.

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[137] Q. Mr. Millenbach, the funds which are received from, for example, P.U.D.'s, the fifteen million plus, are those specified for specific areas and specific hatcheries?

A. Yes, they relate to specific projects and to specific plantings and hatchery areas.

Q. Do any of those funds relate in any way to the Puyallup watershed? A. No.

Q. The last figure, the nine million five hundred eighty-six thousand which you referred to, the Federal funding on the Columbia River—— A. Yes.

Q. —are all of those expenditures earmarked for the Columbia River? A. And tributary to the Columbia River.

Q. Were any of those funds available or in any way used for the Puyallup watershed? A. No.

Q. You referred to the fifty percent funds from the Federal Anadromous Fish Act, I believe total investment being seven hundred eighty thousand dollars. I assume that means three hundred ninety thousand from Federal funds and three hundred ninety from [138] state? A. Yes. Remember the figures I quoted are actual replacement value and they represent that. If it's an Anadromous Fish Act facility it would represent a fifty percent Federal value and a fifty percent state value.

Q. Now, in terms of those funds are they earmarked for specific projects? A. Those funds, yes, do relate to specific projects.

Q. Do any of those funds relate to the operation of the Puyallup watershed or planting program? A. No.

Q. You referred to a figure of four hundred fifty-seven thousand dollars on Dingell-Johnson money; were any of those funds used in conjunction with the Puyallup watershed program? A. No.

Q. With the operation of the State hatcheries what's the annual capacity for the production of steelhead smolt by your current program? A. We're currently producing about 5,000,000 smolts a year.

Q. Now, the smolts that you produce——

THE COURT: So there is no misunderstanding about it, these are—I say—artificially supported fish; these are

the fish you get the eggs from a steelhead that comes up a river and then you raise them in your own facility and then you release 5,000,000 smolt into the various rivers of this State, [139] is that correct?

THE WITNESS: That's correct, Your Honor.

BY MR. MACKIE:

Q. Do all of the eggs for this entire hatchery program come from the Chambers Creek complex? A. No. The Chambers Creek complex is the prime source of our winter steelhead program. However, we also take eggs at the Cowlitz Hatchery to sustain that program and our summer run steelhead program has a basis in a hatchery on the Washugal River which is one of the Columbia River facilities. Our summer steelhead program is basically initiated from that hatchery.

Q. I believe you testified that all of the hatchery fish which are planted in the Puyallup River originate from the Chambers Creek complex. A. Yes. The procedure is to obtain the eggs from Chambers Creek and handle them at the South Tacoma Hatchery——

THE COURT: Excuse me. Where is this South Tacoma Hatchery located?

THE WITNESS: It is near Lake Steilacoom and just southwest of the town of Tacoma, or city.

THE COURT: Actually it's on Steilacoom Road, isn't it?

THE WITNESS: Yes, it is.

BY MR. MACKIE:

Q. Mr. Millenbach, on Chambers Creek there are actually two separate hatchery complexes, are there not? [140] A. Yes, there are. The South Tacoma Hatchery which was built many, many years ago by state funds and is operated

by state funds and a new facility constructed about a quarter of a mile upstream from the South Tacoma Hatchery, again on Chambers Creek, and there was construction utilizing some spring water that was formerly a private trout hatchery. This Chambers Creek Hatchery was constructed with Anadromous Fish Act funds and is operated by those funds.

Q. The Chambers Creek Hatchery is the newer of the two? A. Yes.

Q. Does the Chambers Creek Hatchery, the newer of the two, participate in any way in the hatchery planting program for the Puyallup watershed? A. It has not at this time. The Chambers Creek Hatchery is used to expand the program that was limited in our old South Tacoma Hatchery, and the eggs are incubated at the Chambers Creek Hatchery from the spawning operation at South Tacoma Hatchery, the small fish are reared to spawning size at the new Chambers Creek Hatchery and then transferred out to many of the rearing ponds that are operated under the Anadromous Fish Act. So the two programs are really quite distinct.

Q. When you operate on the South Tacoma Hatchery—this is where you originally take the eggs? A. Yes.

[141] Q. —how long are the eggs retained there before they or the fry resulting from the eggs are transferred to the Puyallup Hatchery? A. The program has varied through the years and we have transferred some eggs directly to the Puyallup Hatchery and in other years we have hatched the eggs when we had sufficient space at the South Tacoma Hatchery and transferred them as small fingerling to the Puyallup Hatchery for continuing rearing.

Q. You simply truck these fish or eggs from—— A. Yes.

Q. —from there to the Puyallup Hatchery? A. Yes.

Q. When you raise the smolts at the Puyallup Hatchery what is the size of fish before you plant them in the river? A. They are about six to the pound on the average and about eight inches in length as an average.

Q. I believe you testified you normally plant these smolts in May of each year? A. Usually between the 15th of April and the 15th of May, because this is the peak of the normal downstream migration of native or wild steelhead smolts.

Q. What is the normal time period that these planted smolts from the hatchery would remain in the fresh water system before reaching the salt water of Puget Sound? A. Most of them are fully smolted by the time we plant them and they move very rapidly to the marine area. [142] For example, we noted one year on the Skagit River we started releasing fish in the middle of April and a week later some of those young fish were observed at the mouth of the Skagit River which is a distance of 50 miles. They move essentially immediately toward salt water.

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[143] Q. Would you tell us what total you have computed for the expenditures by the Department of Game on the steelhead program? A. Yes, I arrived at a figure of one million six hundred thirty-six thousand two hundred forty-seven dollars ($1,636,247) for the expenditures by the Department on the steelhead program statewide for the 1972-73 fiscal year.

Q. Could you give us a breakdown of the figures which result in that total, or major headings? A. Yes. The hatchery expenditures amounted to eight hundred seventy-five thousand nine hundred and seven dollars ($875,907); the fishery management, and let me explain that we have field biologists who are obtaining creel census data in the field and they handle all the management responsibilities relating to steelhead, and I estimated that a portion of their time relating to the steelhead program would amount to an expenditure of two hundred twenty-five thousand dollars ($225,000) a year.

I have another additional breakdown. We have under our Environmental Management activities which relate to the

acquisition of stream bank access, boat launching areas and lands for recreational use [144] and also involved in Environmental Management is some work with mitigation programs, and I estimated expenditures by that Division to total fifty thousand dollars ($50,000).

The final figure I have relates to what we call the Wildlife Management Division which are our enforcement personnel. They spend a great deal of time checking the steelhead fishery and exercising their authorities in relation to the watershed, and I estimated a portion of their total expenditure relating to the steelhead program was four hundred eighty-five thousand three hundred and forty dollars ($485,340).

Q. Mr. Millenbach, have you also examined the source of revenues to match up for the revenue sources as to this total of one million six hundred thirty-six thousand two hundred forty-seven dollars ($1,636,247) of expenditure? A. Yes, I have.

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Q. Mr. Millenbach, just prior to lunch you explained that the operational expenses of the steelhead program [145] were one million six hundred thirty-six thousand two hundred forty-seven dollars ($1,636,247) for the '72-'73 fiscal year. A. Yes.

Q. I ask now if you would break down the source of revenues for those expenditures during the lunch break and you have written numbers on the blackboard. Would you explain those figures. A. I would like to emphasize, these are the expenditure records for the statewide program. From the license fees of the Game Fund there was one million ninety-three thousand six hundred and eighty dollars ($1,093,680) expended. From the Federal Anadromous Fish Act which is direct Federal funding on a 50 percent basis to the state, we spent sixty-five thousand four hundred sixty-six dollars ($65,466). In mitigation programs which includes the Columbia River program, again

a hundred percent funding but again a mitigation for the dams on the Columbia River, there was an expenditure of four hundred seventy-seven thousand one hundred one dollars ($477,101), providing a total annual expenditure of one million six hundred thirty-six thousand two hundred and forty-seven dollars ($1,636,247).

Q. Mr. Millenbach, have you computed the percentage that each of these numbers represents to the total one million six? A. Yes. The license fee expenditure represented 67 percent; the Federal Anadromous Fish Act expendi- [146] ture represented four percent; and mitigation expenditures represented twenty-nine percent.

Q. Of the sixty-five thousand four sixty-six on the Federal Anadromous Fish Act fund were any of these funds available and used on the Puyallup watershed during that fiscal period, '72-'73? A. During that period we had a project of gathering steelhead statistics and other information on anadromous fish. We had one biologist working on the program and he was assigned to the Puyallup River for the winter season of '72-'73. The Anadromous Fish funds attributed to that activity amounted to approximately three thousand dollars.

Q. Were any other funds utilized in that sixty-five thousand four sixty-six for the Puyallup watershed? A. No.

Q. Was any of the four hundred seventy-seven thousand one hundred one dollars, entitled mitigation, applied to the Puyallup watershed? A. No.

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[147] Q. When did the Department of Game first commence planting steelhead in the Puyallup watershed? A. The earliest plants of record date back to the first year that the Game Department was created which is 1933, and generally the river system has been planted annually since that time. I think it's significant to point out that in the early decade, '33 to about the 1940's, that most of the steelhead handled at that time were handled in both the Department

of Game and Department of Fisheries hatcheries. The reason for this was that the Department of Fisheries maintained racks for their salmon cultural activities and it was convenient to also trap steelhead at those facilities. When I first went to work for the Department I recall—this was 1940—that the Department was annually reimbursing the Department of Fisheries for their activities in fish culture on behalf of steelhead. As we increased—we, the Department of Game—increased its hatchery facilities there was more effort put into rearing steelhead and then for the next decade, basically the 1940's, many of the fish planted were yearly fish but were sub-smolt in size because we did not have the capability of raising steelhead to smolt size in one year.

Then I think the significant planting in the Puyallup River system really relates to about 1950 when as a result of improved diets and as a result of improved fish culture we did have a significant portion of the number that were planted were of smolt [148] size and contributed to the fishery. Since that time we have firmed the program up to where smolts only are reared and released into the Puyallup River system.

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[157] Q. With a return of 7,500 fish from this hatchery stock what does this represent as the per adult steelhead cost to the Department of Game for this hatchery program on the Puyallup River? A. Well, if the entire ten percent were caught it would represent roughly $3.72 a fish.

Q. Well, it would mean then, according to your answer, that for each returning fish the Department has invested $3.72 directly. A. Yes.

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[162] Q. Could you please give us the percentage of the total revenue that license fees represent for each of those three exhibits, and please identify the exhibit. A. Yes.

#74-3, the license revenues represented 74.9 percent of total Departmental revenues. In Exhibit 74-4 the license revenues represent 78 percent of the total revenues. And for Exhibit 74-5, the license revenues represent 76.1 percent of the total revenue of the Department.

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[165] THE COURT: You can buy a combined hunting and fishing license?

THE WITNESS: Yes.

THE COURT: How much is that?

THE WITNESS: That's twelve dollars.

THE COURT: And you can also buy just a fishing license?

THE WITNESS: Yes.

THE COURT: How much is that?

THE WITNESS: Seven and a half.

THE COURT: And then in order to fish for steelhead you have to buy a punch card, and that's two dollars.

THE WITNESS: Yes.

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BY MR. MACKIE

[166] Q. Are there three classes of individuals who are not required to obtain a fishing license or pay the steelhead punch card fee? A. Yes.

Q. Would you identify those three groups? A. Juveniles, oldsters who are individuals who have lived in the state for at least ten years prior to applying for the license who have attained their 70th birthday, and Indians are not required to buy a license or punch card.

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[176] Q. Does the Department of Game tag a fish or tag the fish which are planted through the hatchery program? A. Through the years the Department has marked a large number of groups of fish in continuing research attempting to identify the best procedures and procedures that would lead to the maximum survival and results in the program. This generally involved the excision of a fin—one or more fins—so that the fish is identified for future observation. We have incidental to the hatchery rearing of fish an accidental marking of steelhead in that a large proportion of steelhead reared to smolt size in a normal rearing pond receive an injured dorsal fin as a result of the high density of fish involved and this becomes essentially a permanent mark. The degree of deformity ranges, of course, all the way from very slight to an almost complete excision or disappearance of the dorsal fin. Where we have not carried out a specific marking experiment such as removing the adipose fin or ventral fin we have used the observation of the deformed dorsal fin as a measure of returns of hatchery plants.

THE COURT: Where is the dorsal fin located on the fish?

THE WITNESS: On the top side of the fish, right in the middle of the back.

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[179] BY MR. MACKIE:

Q. Are you aware of a study which leads you to any conclusion as to the percentage of the hatchery fish that do not have dorsal fin damage as an identifying mark? A. Yes. Dr. Loyd Royal reported on one experiment that we ran at the South Tacoma Hatchery where a group of fish were marked by the removal of other fins and when the adults returned to the hatchery there was a record kept of the percentage of marked fish which did not have a deformed dorsal fin, and in that instance it was 14 percent.

THE COURT: Excuse me. Fourteen percent did not have the deformity of the dorsal fin, is that right?

THE WITNESS: They had the normal appearing and unidentifiable dorsal fin from a hatchery standpoint.

BY MR. MACKIE:

Q. Now, returning to the 1972-73 creel census on the Puyallup River—62-63, excuse me, I misspoke myself, it should be 62-63; did the personnel of the [180] Department conducting that study examine the fish for dorsal fin damage? A. Yes, and they kept a record of that.

Q. Did they upon encountering fish with such damage record it as being a hatchery fish? A. Yes.

Q. What percent of the total catch was reflected then as being hatchery stock by that examination? A. Sixty-one percent.

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[184] Q. Mr. Millenbach, a creel census was also taken in 1972-73, was it not? A. Yes.

Q. And a report was prepared and submitted to you on that creel census? A. Yes.

Q. Who conducted or was primarily responsible for that creel census? A. Most of the work was done by John Hisata, a fishery biologist.

Q. The creel census that was conducted under his direction resulted in a conclusion as to what percent of the total catch reflected hatchery stock? A. Yes.

Q. What percentage? A. What percent was it? It was 49 percent.

Q. Was that done on the same basis of examining the fish for dorsal fin damage? A. Yes.

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[197] Q. You have made reference to an escapment level of 50 percent. As a manager of the fishery resource what is normally sought as an escapement level for steelhead in

a watershed that is not augmented with hatchery stock? A. As a result of our experience in steelhead management we feel that a desirable escapement level is at approximately 50 percent of the run.

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[199] A. The hatchery fish would be added on to the wild fish and any fish provided through that hatchery program could be deducted from the spawning escapement. So that you could actually have a lower percent escapement of the total run; in other words, if we started with 6,000 wild fish and we added 6,000 hatchery fish we could still take—we could take 9,000 and still retain our 3,000 escapement and the 9,000 of course would be more than 50 percent of the total twelve that I'm talking about.

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[209] Q. Have you computed the percentage of steelhead caught to the total of salmon and steelhead caught in the State of Washington? A. Yes.

Q. What percent is the result of that computation? A. For the year of 1971 it is figured out to be three and [210] three-tenths percent steelhead.

Q. Do you recall the base number of salmon and the base number of steelhead used in that computation? A. The base number of salmon as I recall, and this included pink salmon, was 7,777,000, to round it off, and the steelhead catch for that year of 1971 was 246,000 fish.

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Q. Can you explain briefly the need for statistical information of run size and the economies of the same with reference to a hook and line fishery of steelhead? A. Yes. As I pointed out the population is a relatively small one. The characteristics of the fishery involve a rather long period of time, generally a minimum of three to four months, and in dealing with the catch statistics on a small population caught in some 180 streams throughout the

State and over a long period of time, it becomes extremely difficult to get precise catch information. And because of the inefficiency so to speak of the hook and line gear which eliminates any real concern of an over fishery in most instances, because of this inefficiency, in our management approach we have concluded that the catch statistics developed through the punch card are adequate for management purposes.

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[211] Q. Mr. Millenbach, has the Department computed on an annual basis the average number of steelhead that are caught by the average individual steelhead fisherman? A. Yes.

Q. What is that number? A. Basically, we take the gross catch of approximately 300,000 fish as an average steelhead catch in this State, and we have approximately 150 to 160,000 steelhead fishermen a year; a small percentage of those don't [212] fish, but it comes out to an average of about two steelhead per fisherman per year.

Q. Has the Department also computed at times the average number of hours that a fisherman expends in catching a single steelhead? A. Yes. In our creel census work we frequently record catch per hour information, and we have noted that when a steelhead is caught with about 12 to 15 hours of fishing effort that this is considered a good fishery, success is relatively high. But there are other times when as high as 40 to 50 hours of effort is expended to catch one steelhead.

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[218] Q. Mr. Millenbach, have you examined that draft report? A. I've had a chance to glance through it, yes.

Q. How many days did your staff participate in sampling on the Puyallup watershed for this creel census? A. Fifty-seven days.

Q. And this is for the fishing season 1973-74? A. Yes.

Q. Was the length of that season comparable to the last year's season 1972-73? A. Yes.

THE COURT: How many days?

THE WITNESS: We had 121 days, Your Honor, in the regular season.

BY MR. MACKIE:

Q. How many anglers were interviewed in the course of this 1973-74 census? A. Three thousand two hundred forty-three.

Q. How many steelhead did your personnel encounter in the course of those interviews? [219] A. Two hundred fourteen.

Q. And what number of those 214 reflected dorsal fin damage reflecting that they were hatchery fish? A. Forty-two percent.

THE COURT: How many fish?

THE WITNESS: Excuse me, Your Honor. The total is 90.

BY MR. MACKIE:

Q. What percent of the total number of steelhead examined thereby reflect the damaged dorsal fin? A. Forty-two percent.

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Q. Mr. Millenbach, handing you what has been marked as Plaintiff's Exhibit #22, what is this exhibit entitled? A. This is entitled "Puyallup River Creel Census 1973-74."

[220] Q. Was this prepared by a member of your staff? A. Yes, by Mr. Dave Gufler. He is a regional biologist.

Q. What period of time is covered by that report? A. The month of December 1973.

Q. Is this information included within the composite report referred to as Exhibit #21? A. Yes.

Q. In examining the report by Mr. Gufler how many days were involved in his portion of the creel census on the Puyallup watershed? A. Thirteen.

Q. Would all of those days have been in the month of December? A. Yes.

Q. How many fishermen or anglers did he contact in the course of that? A. Nine hundred and twenty.

Q. How many steelhead did he find in the course of those checks? A. Eighty-eight.

Q. How many of those steelhead reflected dorsal fin damage reflecting that they were hatchery fish? A. Forty-six.

Q. What percent of the total steelhead checked by Mr. Gufler reflected that they were hatchery planted fish? A. Fifty-two percent.

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[223] Q. Mr. Millenbach, in your section on fish management do you have other biologists who report to you? A. Yes.

Q. How many biologists do you have on your staff? A. We have totally in the Fisheries Division eighteen field biologists and I have two research biologists on the office staff, plus three biologists staffed with the Division.

[224] Q. Do those individuals hold any form of specialized educational degrees, who hold those positions? A. They all have Bachelor of Science degrees in fisheries or equivalent fishery biologist degrees.

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Cross Examination

BY MR. RODGERS:

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[240] Q. Now, the question, Mr. Millenbach, and what I'm trying to get at, as I recall we established earlier how much goes into the Game Fund from the sale of punch cards. Now, I want to establish if we can how much goes

into the Game Fund for fishing licenses held by steelhead fishermen in the State of Washington. A. To precisely determine that would be very difficult because you don't have a break out of the combination license holders and the straight fishing license holders related to the permit. You can get a permit under any one of those two. In fact, you can buy a permit under a county license yet.

Q. Can we have a general estimate? Would it be about a million dollars? A. That would hit reasonably close, yes.

Q. So, if we added together the contributions to the Fund of the sale of punch cards and licenses combined we would get a figure of one and a quarter million dollars, approximately? [241] A. Adding those two figures you would, yes.

Q. That's about ten percent of the Game Fund based on the eleven million dollar figure you gave us earlier? A. It would be ten percent of that figure, yes.

Q. Do you know whether the steelheaders get back from the Game Fund more than they pay in? A. I don't know of any effort to clearly determine this. I personally have made no effort to. In a general way I believe that our programs reflect license revenue but there has been no precise effort made to determine and associate funds with programs.

Q. Do I recall correctly your testimony of yesterday indicating that you had statewide expenditures by the Department for the operational costs of the steelhead hatchery program of $1,636,247? A. That included more than the hatchery program, yes.

Q. All right. What are the additional costs included in that figure? A. Additional costs were the costs attributed to the Fishery Management activities, the Environmental Management activities and the Wildlife Management Act.

Q. Based on that can you yet make an estimate as to whether steelhead fishermen are getting back more than they're paying in? A. Well, the figures that you developed are slightly over a million dollars and the figures here of course exceed that.

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[250] Q. Mr. Millenbach, as to the Puyallup River you testified yesterday with respect to Exhibits 74-2 which was entitled "Puyallup River System Steelhead Plants and Catch,"—do you have that exhibit before you? A. Yes, a copy of it.

Q. As you indicated yesterday we have two columns, one [251] under "Indian" and one under "Sports," is that correct? A. Yes.

Q. Is it your testimony that we could get a fair comparison of the Indian and sports catch by comparing the respective columns? A. No, I don't believe so.

Q. And your reason for that is? A. The reason for that is the Indian catch is only as available and does not have as strong a foundation as the sports catch which we relate to the punch cards.

Q. So it is your testimony that the Indian data is insufficient on the basis of that exhibit to make the comparison I'm asking about? A. I think generally that's true, but for the period from '54 to '63 when there was no problem over the Indian fishery I believe the figures are fairly representative.

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[269] Q. Would it be fair to say that the dominant ingredient of your smolt release decisions would be sportsmen satisfaction? A. That's a dominant one, yes.

Q. But I believe you testified it is not the sole one. A. Yes.

Q. If Imight turn to a few historical matters, Mr. Millenbach, am I correct in assuming that the Game Department has no data or information on the extent of the steelhead run on the Puyallup River drainage system during the decade of the 1840's to '60's? A. That is correct.

[270] Q. Do you know whether the Puyallups at the time of signing the Treaty of Medicine Creek in 1854 took steelhead? A. I would believe they did, but I don't precisely know it.

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[271] Q. Is it a fact, Mr. Millenbach, that the science of rearing fish artificially under controlled conditions has been known for centuries? [272] A. I am not familiar with other species, but the fish culture relating to salmonoid dates back——

THE COURT: Fish what?

THE WITNESS: Other fishes.

A. (Continuing) Artificial propagation of fish culture as far as salmon and trout are concerned relates back to about 1875, I believe.

BY MR. RODGERS:

Q. You are familiar, are you not, with the Game Department's pamphlet on the Washington Trout Hatcheries? A. I know we have one.

Q. And is it your experience that Game Department publications are accurate? A. If I write them, yes.

THE COURT: He didn't write them. Let's don't tar him with the brush he didn't paint with.

BY MR. RODGERS:

Q. Do you have any basis for disagreeing with this statement from the Washington Trout Hatcheries—Washington State Game Department Trout Hatcheries pamphlet, "The science of rearing fish artificially under controlled conditions has been practiced since the earliest history of man"? A. My recollection is that the earliest reference to any artificial propagation of fish that I've seen relates to China and carp. I don't precisely recall that that predates historical man.

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[273] Q. Generally you've testified as to the number of hatcheries and rearing ponds used for steelhead propagation purposes. [274] A. Yes.

Q. These facilities are centralized primarily under your direction, is that correct? A. They are all under my direction, yes.

Q. Is it a fact that personnel occasionally are transferred from one facility to another? A. Yes.

Q. Is it a fact that eggs and fingerlings are transferred from facility to facility? A. Yes.

Q. Is it a fact that fish trapped at different—fish are trapped at different locations to provide eggs at your facilities? A. Yes.

Q. Would it be fair to call your management of steelhead hatcheries and rearing ponds in Washington State an integrated operation? A. Yes.

Q. Turning now to the Puyallup Hatchery or the several hatcheries there involved, as I recall your testimony you say you take eggs for the Puyallup River smolts from the Chambers Creek steelhead entrapped at Chambers Creek, is that correct? A. From steelhead trapped at Chambers Creek and transported to the South Tacoma Hatchery, yes.

Q. Does that run into Chambers Creek—is that run a natural or artificial run? A. It was a natural run and has been increased through artificial propagation.

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[275] THE COURT: By that do you mean you release the smolt from the Chambers Creek area and then they return?

THE WITNESS: Yes, Your Honor. In fact, the actual number is about 50,000 smolts a year to maintain the run of Chambers Creek.

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BY MR. RODGERS:

Q. Now, your testimony, as I recall, you take the eggs to South Tacoma, the fingerlings are reared at South Tacoma and then transferred to the Puyallup Hatchery? A. Yes. The program is accomplished in two different ways. Some years the small fingerling are hatched at the South Tacoma Hatchery and transferred as fingerling directly to the rearing ponds at the Puyallup Hatchery. In other years, due to the overall programing we have moved eggs directly from the South Taco- [276] ma Hatchery to the Puyallup Hatchery for incubation and hatching and then rearing.

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Q. . . . If something happened to your South Tacoma supply of steelhead would it be possible to draw upon other hatcheries for your Puyallup stock? A. Yes.

Q. Is it common that an entire supply of fingerlings [277] could be destroyed by disease or otherwise? A. It's a possibility but extremely—I wouldn't say extremely uncommon, but it is uncommon. For instance, at the South Tacoma Hatchery we have never had such an experience in the time that I've been involved.

Q. It is a fact, is it not, that if you wanted to, beginning tomorrow, you could decree that fingerlings from—well, perhaps not beginning tomorrow—is there any principle of fisheries management that would preclude your reliance upon fingerlings from the Chambers Creek facility to supply the Puyallup facility as opposed to the present reliance on the South Tacoma Hatchery? A. There's no principle of management that would preclude that. In fact, our steelhead program has been developed primarily from the single source of eggs, however, there are many opportunities where the Department could obtain steelhead eggs as a result of our fish cultural operation, but Tacoma is the most convenient, the most efficient and the most practical.

Q. From a point of view of convenience, the Chambers

Creek facility is not that much farther away from the Puyallup facility than the South Tacoma Hatchery, is it? A. No, the Chambers Creek Hatchery is within a quarter of a mile of the South Tacoma Hatchery.

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[291] Q. Directing your attention, Mr. Millenbach, to the entries under the month of June, particularly the last entry, the one beginning "101,010—— A. Yes.

Q. Could you—— A. This entry shows the transfer of 101,010 Cowlitz River steelhead weighing 91 in the pound, total weight of 1,110 pounds was transferred from the South Tacoma Hatchery to the Puyallup Hatchery.

[292] Q. Don't you interpret that as indicating a transfer from the Chambers Creek Hatchery to the Puyallup Hatchery? A. Yes, I do, and these fish were not released, however, into the Puyallup River as a result of it.

Q. All right. Could you tell us what happened—have we established then that 101,000 winter steelhead have been shipped from the Chambers Creek Hatchery to the Puyallup Hatchery? A. Yes.

Q. All right. Then what happened to the steelhead? A. They were transferred back to the South Tacoma Hatchery for additional rearing.

Q. How long did they stay at the Puyallup Hatchery? A. The record is not here and I don't know offhand.

Q. Could it have been a period of a month? A. I would assume it was a period of less than two months, although I don't know offhand.

Q. Is it fair to assume that during their stay at the Puyallup Hatchery they received feed and other maintenance? A. Yes.

Q. Is it a common practice to transfer steelhead from Chambers Creek—from the Chambers Creek facility to the Puyallup facility for a short period of time? A. No, I would not consider it a common practice.

Q. Do you know the reason why this transfer was made? A. I don't know offhand, no.

Q. Would it have been possible that this transfer was [293] made in anticipation of 101,010 winter steelhead being released or being part of the plant in the Puyallup River? A. No, because the plant in the Puyallup River was of Chambers Creek origin—now that's Chambers Creek for the adults to the South Tacoma Hatchery to the Puyallup Hatchery for the rearing of smolts for the Puyallup River. The report that we refer to here in the transfer of 101,000 Cowlitz River steelhead involve a different program.

Q. Is this program separately financed under the books of the Game Department? A. No.

Q. Do you maintain separate financial accounts for the Chambers Creek and South Tacoma facilities? A. Yes, and if I may clarify my previous answer, I related the separate accounting to different funding. Yes, we keep separate records, complete financial records at each and every facility.

Q. Now, you've indicated to us that it is possible that a truck used at the Chambers Creek facility might also have been used at South Tacoma. Can you think of any other facilities or equipment from Chambers Creek that could be used also at South Tacoma? A. All of the equipment in the operations are considered to be a general Department of Game operation. There are general Department of Game funds invested in the program and we make no attempt to isolate individual pieces of equipment or individual things and relate it [294] to a specific project and only use it there.

Q. That wouldn't make any sense from a management point of view, would it? A. That is correct.

Q. And in fact no distinction would be made along the lines that you suggested with respect to equipment purchased for or provided for other facilities funded under the Anadromous Fish Act. A. I would say only that depending on the project, it's location and so forth, which

might in itself—for example, like the Bogachiel rearing pond which is isolated. The Bogachiel rearing pond, by way of explanation, is located at Forks, Washington; that is isolated from other facilities and we would not have interchange of equipment as you might in the case of Chambers Creek and South Tacoma. But other than that the facilities are generally treated as Department of Game facilities.

Q. Mr. Millenbach, does the Federal funding for the Chambers Creek facility cover in any way the salaries of the employees? A. Yes.

Q. And might those employees engage in work at other state funded facilities during the course of their employment by the Department? A. Yes, the same as other departments' personnel might be assigned to Chambers Creek who are not normally there.

Q. And they would attend departmental meetings? [295] A. Yes.

Q. Engage in departmental policy work? A. Yes.

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[308] Q. Your Department has the power, does it not, to destroy the natural fish population in a lake? A. Yes.

Q. In fact, is it not part of your Department's programs to engage in that policy? A. Yes.

Q. Could you please explain the purposes of that program? A. Yes. The practice of removing the population in a lake relates to a program we call lake rehabilitation. It's used to remove a population of fish which is providing an undesirable level of return to the fisherman and a low rate of production. This generally relates to the occurrence of exotic species which set up a competitive program, competitive situation with trout which are the native fishes with the resulting factors of very low survival of hatchery fish and very low levels of production. In the process of removing the entire population as managers then we can come back with a species of fish which will give us a high

level of return at a minimum cost from that particular body [309] of water.

Q. And you describe that process as rehabilitating a lake? A. Yes.

Q. Do you have the power to rehabilitate, as you've described it, a river system? A. The Game Commission has the authority to approve the removal of the game fish from a river system, yes.

Q. So you do have the power, if you wish to exercise it, to destroy the natural run in the Puyallup River and replace it entirely with an artificial run? A. I would say as a practical matter, no, because there are other species involved. The salmon population certainly the Department would not have the authority to destroy, and from a practical standpoint it would be impractical.

Q. From a policy point of view would you believe that that step would be desirable? A. No.

Q. There would be no problem if you did do it of any possible competition between the natural and the artificial species. A. I'm sure that the agency responsible for the other species would object and we would not override them.

Q. Is there any way technically to exterminate only the natural steelhead? A. No.

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[310] Q. What is a residualized steelhead? A. I think Dr. Loyd Royal related that to steelhead smolts planted from the hatchery which did not move to salt water and thus took up residency in the stream in which it was planted.

Q. Would you agree with Dr. Royal's conclusion on page 87 of his report that residualized fish become competitive with the wild fish, hence any survival is probably deductible from that of the wild population? A. Yes, I think generally that would be correct.

Q. Of the 100,000 steelhead smolts planted by your Department in the Puyallup system in 1970 can you give us

an estimate as to how many of that number became residualized? A. We have no specific information. The average size of fish indicated they were all smolts and I would suspect that essentially all of them moved to the marine environment.

Q. Have you done any studies on the Puyallup River system to indicate the extent of residualization from your smolt plants? A. No.

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[311] THE COURT: Does a residual fish that stays in the Puyallup and never goes to sea, is he different when you catch him than a fish that's migrated to salt water and comes back?

THE WITNESS: Yes, Your Honor. If he lived to survive very long he would grow only a very slow rate and he would either have to be caught or he would die. The life term of them probably would be only a few months, however, some few might survive to go to sea the following spring. In some of our early work with summer steelhead we had difficult in raising our fish to smolt size—this was back in the late 1950's—and we did observe fish in the river that appeared to residualize and there was indication that some of them moved out the following spring. The reason I say that is because they were marked and when the returning adults came back it showed a longer time frame for those fish that had residualized for the balance of one year in fresh water.

THE COURT: They can't take up permanent occupancy then, for example, in the Puyallup River and stay in fresh water their entire life span and live a natural——

THE WITNESS: It's possible, but the number of fish that would do so is exceedingly small. Most of [312] our anadromous fish streams have very, very few resident rainbow that don't go to sea.

THE COURT: The instinct is pretty strong then.

THE WITNESS: Yes.

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BY MR. RODGERS

[317] Q. When you extract eggs from a fish taken, let's say, at Chambers Creek is the fish killed by that process? A. At South Tacoma Hatchery we did develop and maintain a procedure in which the adult females are killed for spawning purposes. The reason for this is, we increase the number of eggs, viable eggs that were available per fish, we increased the hatchability of those eggs with the result that it required a much—or at least a reduced number of adult fish to support our program and minimizing then the sacrificing of fish for this purpose. Also there is the aspect of only about five percent of the adults return to spawn a second time anyway, so we weren't sacrificing really a significant number of fish as far as future fishery is concerned.

Now, in our summer steelhead program we have developed a little different technique and we do not [318] destroy the females in this particular operation.

Q. It's true that at South Tacoma you would sacrifice a natural steelhead taken that might otherwise be able to reproduce. A. Yes, if it were among the fish that we picked up.

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[339] Q. Is there a generally accepted criteria for determining when a nip on the dorsal fin is sufficient to indicate that the steelhead was hatchery reared? A. We have no precise definition of it, but any deformity that is observable is classified as a deformed dorsal fin.

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[352] Q. Let's take all three of your separate computations, Mr. Millenbach. Is it your testimony as an expert in Fisheries Management that the three figures that you've

given estimating the size of the natural steelhead run on the Puyallup are based upon scientifically reliable data? A. My answer would be yes, to the extent of the broadness of the data that we have; recognizing that the data does not relate to a predetermined study to give what might be described as a more complete record of actually what is happening. The basic information I used was data which was gathered incidentally and has to be treated within that purview.

Q. Nonetheless, you believe as I construe your last statement that the estimates within those qualifications are scientifically reliable. A. Yes.

Q. And in fact, is it true that these are figures that you would rely upon in establishing any regulations that may result pursuant to the order of this Court? A. I believe that the figures as used here have decided limitations and that if we were instructed by some court order, to say, allocate the fishery, to do it in a meaningful way would require broader information and more complete information which could be obtained through a special designed effort to do so.

Q. But you'll agree with me then that the figures you have offered would, in your opinion, not be sufficient to make a reliable allocation? [353] A. As a manager I would prefer to have much additional information, but until that such information is available I think the decision would have to be based on what is available.

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[378] Q. ... Just a few more questions, Mr. Millenbach. Do you recall making a statement before the Game [379] Commission on October 2 of 1972? A. Yes.

Q. Do you recall reporting on the steelhead situation at that time in the Puyallup River Basin? A. I believe there was some reference made to it.

Q. I only have a single question and perhaps we can do it without reference to the document. Did you make a recommendation on that day to the Commission? A. Yes.

Q. What was that recommendation? A. That the resource—that there be no commercial Indian net season set on the Puyallup River.

Q. Do you remember saying, because there is no information on ocean abundance we are unable to reliably predict annual size? A. Yes.

Q. And do you remember saying, we have no predictions on the run of steelhead? A. Yes.

Q. Now, do you recall also, Mr. Millenbach, making a statement before the Commission in August of 1973? A. Yes.

Q. On that occasion did you also have a recommendation with respect to the Indian fishery on the Puyallup River? A. Yes.

Q. Do you remember saying on that day as follows: No information is available on the take of steelhead [380] by foreign gill net fleets on the high seas, but research has established that steelhead can be taken with such gear. Literally hundreds of miles of highly effective monofilament net is used in this fishery. A. Yes.

Q. Now, do you believe, Mr. Millenbach, that the foreign fishery takes a substantial percentage of the steelhead that are initially smolts from the Puyallup River system? A. I believe that the potential is there for the foreign fleets to intercept the steelhead from the Puyallup River system. It is very unfortunate that there is no specific data relating to that.

[Q] Thank you.

Mr. Millenbach, do you recall in your concluding paragraph in your presentation to the Commission in August of 1973 stating as follows——

THE COURT: What was that date again?

MR. RODGERS: August of 1973.

BY MR. RODGERS:

Q. "The Department finds little evidence in the available data and observations for suggesting that the 1973-

74 steelhead run will be larger than the 1969-70 run. We have no capability of accurately forecasting run size—no agency, Federal or otherwise, can—and on the basis of the data we do have cannot recommend a commercial net season for steelhead." A. That is correct.

[381] Q. I believe you may have testified to this, but does the Department yet have the capability of estimating run size? A. No.

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[385] Q. I believe testimony established yesterday that in June of 1973, 101,000 winter steelhead fingerling went from the Chambers Creek facility to the Puyallup Hatchery, is my recollection correct? A. Yes.

Q. And they stayed there for some time. Did we establish how long? A. I checked the records in the office last night and determined that that 101,000 fish was planted in July of 1973 in Steilacoom Lake. So, obviously, from the record they were surplus to our rearing needs.

Q. Do I understand you to have corrected your testimony of yesterday which I understood to say that they went back to the Chambers Creek facility? A. My recollection is they went back to the South Tacoma Hatchery. I said I didn't have the record, but my recollection was they were transferred back to the South Tacoma Hatchery. Actually, the South Tacoma Hatchery personnel planted the fish in Steila-[386] coom Lake.

THE COURT: Those were steelhead?

THE WITNESS: Small steelhead fingerling, Your Honor. We normally in our program take a surplus of eggs so that we can select out the best quality fish available and wind up with some surplus of very small fingerling, and the procedure now is to release these into lakes where there will be maybe some survival.

THE COURT: You put them in Steilacoom Lake. Steilacoom Lake is drained by Chambers Creek.

THE WITNESS: Yes.

THE COURT: Wouldn't they reach smolt size and go to sea that way?

THE WITNESS: If any of them do survive, and there's a possibility a few could, they could do exactly that, Your Honor.

THE COURT: You mean they could survive—you mean they can't live?

THE WITNESS: They usually——

THE COURT: The people on Steilacoom Lake, the fishermen, aren't going to catch them all, not 101,000 fingerling.

THE WITNESS: Your Honor, a fingerling of that size planted in a mixed species lake, which contains bass, croppies, perch, sunfish and others, there's a very low survival of fish to catchable size.

THE COURT: You are just feeding the available——

THE WITNESS: We fed the other game fish with [387] steelhead fry, I guess.

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Cross Examination By Mr. Sennhauser

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[403] Q. The Department of Game—You would agree that the Puyallup River as you presented in your evidence has benefitted to a small degree by Federal funding. A. Yes.

Q. And there are other streams and rivers which receive a much higher degree of benefit proportionately from Federal funding than the Puyallup.? A. Yes.

Q. Now, would you agree that the Department of Game is able to put more monies into the Puyallup River because of a reliance on Federal funds for other rivers? A. I

don't think the allocation of funds to expenditures are made in that manner. To say that they could be, [404] I would say yes, but our steelhead program is related to the rivers that are to be planted and the funding, irrespective of its source, supports the program.

Q. In other words, the Department of Game funds steelhead propagation facilities and production from all sorts of different funding sources and the results or benefits that accrue on the Puyallup or Skagit can't be linked directly to any specific source of revenue that comes directly to that river. A. Other than as we have shown, there have been no fish from the Federally supported facilities going into the Puyallup River.

Q. If the Federal funding were cut off for the Department of Game as a result of other rivers receiving a high percentage of these funds, would not the Department of Game have to cut back as well on the Puyallup River, even though there was no Federal funding going directly into the Puyallup River? A. Not necessarily so. I would relate to the record of fish planting in the Puyallup River which showed a level of approximately 60 to 70,000 smolts before we had any Federal funding in our steelhead program.

Q. Are you aware in 1973 that less than 1,000,000 smolts could have been planted by the Game Department without any reliance on Federal funds? A. Again, if you give me just a second here I think I have some records in that regard.

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[405] Q. Do you know how many smolts could have been planted by the Game Department without any reliance on Federal funds?

MR. MACKIE: Would you give us a time frame?

Mr. SENNHAUSER: 1973.

A. If we include the Columbia River programs mitigation funds and add to it the production in the P.U.D. mitigation

hatcheries and then add the production from straight State funding, I have approximately 2,000,000 smolts—winter run. In addition to that I have 1,700,000—in round figures—summer runs. The balance under Federal funding then, which would be D.J. which is in effect sportsmen's dollars, and the 50 percent Anadromous, is approximately 1,300,000.

THE COURT: Now wait just a second, I don't understand that a bit. The question was, did you in fact, or could you have planted less, and I understand this to be "did you?" In other words, the State [406] financing alone, without any Federal monies, could only produce 1,000,000 smolts in 1973. That's the question and it's yes or no.

THE WITNESS: I would answer yes, Your Honor, if I may with the qualification that this does not include any production from mitigation hatcheries.

THE COURT: In other words, the production from mitigation damages is in addition to the 1,300,000 smolts.

THE WITNESS: Yes.

THE COURT: Can you figure how many smolts you produced with the Federal funds alone?

THE WITNESS: If we define Federal funding, Your Honor, as Anadromous Fish or D.J. funding—D.J. is Dingell Johnson funding which is a tax on fishing tackle that comes back through an allocation to the states; if you classify that as Federal funding I can give you the figure of 1,210,000, in round figures, that are smolts that are planted under the Dingell Johnson and Anadromous Fish funding programs.

THE COURT: Is that $1,210,000?

THE WITNESS: No, smolts, Your Honor.

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Redirect Examination By Mr. Mackie

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[424] Q. Has the Department engaged in a planting program to put summer steelhead in streams which did not have a natural run of same? A. Yes.

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Redirect Examination By Mr. Willner

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[438] A. On November 28, 1973 the State Game Commission established certain commercial gill net seasons for Treaty Indians including a season on the Puyallup River.
[439] Q. When was that season? A. That season was established on November 29th, 1973; the starting date as I recall it was December 3.

Q. How long did it go on? A. It has extended to the 17th of January with weekend closure periods from, as I recall it, six p.m. Thursday evening to six p.m. Sunday evenings.

Q. Did your Department observe the number of Puyallup Tribe commercial net fishermen that were fishing during that season? A. Yes.

Q. How many were there? A. Our wild life agents patrolled the river and talked to a number of the fishermen and they estimated that there were from 14 to 20 fishermen most of the time, and I have received fish buyer tickets reporting the names of 23 different individuals.

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Q. Mr. Millenbach, you previously testified that members of treaty Indian tribes do not pay a State license fee for fishing, is that correct? [440] A. Fishing in their ceded area.

Q. Do members of the Puyallup Tribe pay any money to fish the Puyallup River? A. No.

Q. Now, does the Department of Game at no cost to the members of the Puyallup Tribe provided any services

which enhance the Puyallup Tribe fishery? A. Well, the hatchery planting of smolt steelhead have contributed substantially to the net catch in the Puyallup River—the Indian net catch.

Q. What other ways have you assisted their fishery? A. In the general protection of the watershed, particularly the activities of our wildlife agents who constantly surveil the general area to make sure the game laws are not being violated, that someone doesn't have a net above Mud Mountain Dam, or someone is not destroying fish habitat. This is a very essential part of overall management and protection of the resource.

Q. Have you in addition been working for better fish ladders? A. Yes. We have had considerable communication with Puget Sound Power and Light concerning the fish ladders on the Buckley Diversion prior to the reconstruction in 1942 associated with Mud Mountain Dam, and we of course already mentioned are seeking intervention in the case relating to the Federal Power Commission having jurisdiction to issue a license for current projects there.

[441] Q. Do you do any work with logging companies in connection with maintaining streams, slash and debris? A. Department personnel responsible for our so-called hydraulic law application and hydraulic permits have greatly expanded their efforts in communication with logging operators to minimize the adverse impact of logging on the stream environment.

Q. Do you intervene on water rights applications? A. We review all water right applications and make recommendations for the preservation and protection of fish life.

Q. Do you do research on steelhead trout and ways of improving the run? A. Yes. This has been a continuing thing with the Department.

Q. These activities you just described, do they benefit the Puyallup Tribe fishery? A. Yes.

Q. Are those activities paid for from the Game Fund? A. Yes.

Q. Mr. Millenbach, you told us, but tell me again, when did you start working with the Department of Game? A. In 1940.

Q. Have you been with them ever since? A. Yes.

Q. Since 1940 has any Federal monies been used for the rearing of steelhead trout planted in the Puyallup River? A. No.

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Recross Examination By Mr. Rodgers

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[445] Q. How many fish are destroyed in the production of the eggs for your hatchery program? A. At the South Tacoma Hatchery we take 3,000,000 eggs and there are 3,000 eggs per female so that would be a thousand fish.

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Q. With respect to the density factor about which Mr. Mackie questioned you, isn't it a fact when the return [446] from the plant drastically falls off we can assume that there's been a higher rate of mortality? A. Yes.

Q. Also, in response to a question put to you by the Court, is it not then fair to assume that the reason for this mortality is that there have been too many competitors for the available food supply? A. Well this is speculative yet and there may be some other factors that are involved. I know that Dr. Loyd Royal alluded to the marine environment as a possible factor in this density barrier feeling that the estuary itself may not have been adequate in terms of living space and food supply to provide an equal survival to the increased plantings.

Q. In any event, you agree that available food is a very important parameter? A. I am sure it is.

Q. You were also questioned about your policy of planting sub-smolts in the Puyallup River system. With respect to that do you recall when the Department planted 24,300 steelhead fry and/or sub-smolts in South Praire Creek in 1970? A. Yes. You refreshed my memory in calling that figure to mind. I recall that the winter season of 1969 was the lowest run of steelhead in ten years. We were greatly concerned about adequate spawning escapement. We did have some surplus fry available and on that basis there were some scattered plants of sub-smolts made in the fall of that summer.

[447] Q. Do you also recall that the Department planted 20,700 steelhead fry and/or sub-smolts weighing a total of 180 pounds in the Puyallup River tributaries other than South Prairies Creek during 1970? A. Yes, that was part of the same planting that I referred to.

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MR. WILNER: Your Honor, there was a question I neglected to ask him on my cross and I would like permission to ask him now.

THE COURT: All right.

Redirect Examination

BY MR. WILNER:

Q. Mr. Millenbach, you and I were talking before court opened about the smolts that Mr. Sennhauser asked you about which were planted with Federal funds. Do [448] you have a computation there with you as to how many of those smolts were planted with user money, Dingell Johnson money? A. Yes. For the year of 1973 there was a total of 572,000 steelhead planted from projects that were operated under D.J. funds.

THE COURT: Are those matching funds? Does the State have to match any of that money?

THE WITNESS: It's 25 percent matching State money, Your Honor.

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TESTIMONY OF MR. JOHN HISATA. CALLED AS A WITNESS BY THE DEPARTMENT OF GAME

Questioning By The Court

[464] Mr. Hisata, this stub dorsal fin has been testified to as being a common characteristic of hatchery fish.

THE WITNESS: Yes.

THE COURT: Have you seen this in the hatchery itself and in the smolt that are put out in the Puyallup Hatchery?

THE WITNESS: Yes, I have, Your Honor.

THE COURT: How extensive is it from your own observation?

THE WITNESS: From my own observation I would say it exceeds 90 percent of the smolt released. This condition will vary as to the method in which, or with which the smolts are raised. If they're raised in rather limited space as occurs at the South Tacoma Hatchery or Puyallup Hatchery they would have more, or I think a greater occurrence of this stub dorsal condition than if they had been raised in a rearing pond with a larger area.

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TESTIMONY OF MR. CLIFFORD J. MILLENBACH. CALLED AS A WITNESS BY THE DEPARTMENT OF GAME

Questioning By The Court

[484] THE COURT: This has reference to the regulations that are attached to the amended petition on remand which are the regulations that the State has established on this river regarding Indian fishing, is that right?

THE WITNESS: Yes.

THE COURT: Now, the nets that you folks have allowed to be placed in the river by the Indians, how large are they?

THE WITNESS: In that regulation, Your Honor, we fixed a maximum length of 150 feet. The basis for this was regulation by the Department of Fishery and even a recommended regulation by the Puyallup Indian Tribe previously. I drew on that background to develop the recommended regulation for the Commission's consideration. The 150 foot length is common for what we term set nets in a river fishery. I think the limit derives from that. If it were to be unrestricted as to length it could conceivably extend far enough downstream to effectively net the whole river. I think the limit to the length is for the pur- [485] pose of allowing the escapement of some fish while the net is fishing.

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[488] THE COURT: How actually does this net catch a fish?

THE WITNESS: The fish pushes its head through the net trying to travel upstream and, of course, can't get through the mesh and as it attempts to back out of the mesh the gills entangle in the mesh.

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[489] THE WITNESS: Your Honor, there was an extremely tight time frame from the time the Department received the decision from the United States Supreme Court, and because the steelhead run was starting the Department made its greatest effort to establish a season to accommodate the ruling and to follow the ruling, rather, of the Supreme Court and set a season for Indian people. In arriving at recommendations for such a season I drew on regulations that were in existence. Among them was a proposed regulation by the Puyallup Tribe that had been

drawn up, I believe, about two years previously and may have been exercised by tribal members, I don't know. . . .

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Redirect Examination By Mr. Willner

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[500] Q. Mr. Millenbach, before you continue, do steelhead when going up river tend to hug the bank? A. Yes.

Q. And so when you—can you place a net of 150 feet in length, if you place it correctly, and get most of the steelhead? [501] A. In certain areas the set nets can be extremely effective, particularly in the natural condition of a river where pools and bends in the river created a limited passage. In the case of the Puyallup River in the lower section where the fishery was allowed you don't have the natural bends and angles of the stream—it's basically a channel stream—so the situation in this instance is somewhat different.

Q. So do steelhead still hug the bank? A. They generally travel upstream following certain current patterns and follow the bank. Again, with relation to your point where you do have a natural stream configuration there are instances where a set net can be extremely effective.

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[507] Q. I asked you yesterday if you could develop an estimate for the number of sports fishermen fishing the Puyallup [508] River in any given year. Do you have such an estimate, and how did you derive it? A. Yes. In compiling the catch statistics from the punch cards a record is maintained of the number of cards which had punches for the Puyallup River. This number for the season of 1971-72 was 2,181. We also have a record of the number of successful fishermen and the unsuccessful fishermen, and using that same ratio to apply it to the Puyallup River and the 2,181 successful fishermen, we find there were 2,990 un-

successful fishermen, giving us a total of 5,171 fishermen for the Puyallup River during that season of 1971-72.

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Questioning By The Court

[509] THE COURT: Presumably a sportsman with a hook and line could come in and if an Indian had a net in the river, could the sportsman come in and fish ahead of the net?

THE WITNESS: He certainly could, but it's not a very productive way to fish, Your Honor, if you are going to try and compete with a gill net with a hook and line. It is pretty discouraging, I think, to most fishermen. The recreational fisherman was not excluded from the lower Puyallup River at the time the Indian fishery net season was in progress. Also, Your Honor, I think I'm correct in saying that the majority of the net fishery takes place at night, so [510] you don't have the conflict that way.

THE COURT: Is that right?

THE WITNESS: Set nets, of course, will be set 24 hours a day, but in the Puyallup system in the areas fished there are not a great many set net sites, as I understand it.

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TESTIMONY OF MR. MARK SCHULLER, CALLED AS A WITNESS BY THE DEPARTMENT OF GAME

Direct Examination By Mr. Mackie

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[573] Q. Could you describe briefly what you are doing in the course of that study; what is the object of your study. A. Well, I would say the main goal of my study was to develop a way to separate hatchery and wild fish by the scales, and once that was established, to look at the differences in the populations as to size of fish, growth rate, per-

centage of repeat spawners, sex ratio and just every aspect that I could put into it.

Q. In terms of the separation have you utilized an exami[574]nation of the scales to try and indicate a difference for identification purposes between hatchery and native stock? A. Yes, I have.

Q. Steelhead, that is. A. Right.

Q. In the course of your examination and project have you reached a conclusion as to whether scales are, in the study, a valid method of making a determination between native and hatchery stock? A. Yes, I believe that scales are a valid criteria.

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[585] Q. Could you tell us what the total percentage was that you found for the '71-'72 season on the Puyallup [586] to represent hatchery stock of the total examined? A. Of course it varied by month, but the total for that season is 52.3 percent.

Q. Did you make a similar series of computations and a total computation for the '72-'73 season? A. Yes, I did. It is 50.9 percent—excuse me, 50.9 percent for that season, and then we ran a Chi Square test to see if we could group both of those years together.

THE COURT: A what?

THE WITNESS: A statistical test which showed we could group both of these seasons together, that these two percentages were similar.

THE COURT: Would you spell that?

THE WITNESS: That's C-h-i Square.

THE COURT: S-q-u-a-r-e?

THE WITNESS: That's right.

BY MR. MACKIE:

Q. Mr. Schuller, is that sometimes referred to as determining a confidence interval figure? A. The Chi Square

test is not the confidence interval. It's computed simply by just taking a table, you find the mean of all these and you use a table depending on the sample size to put a confidence interval on that.

Q. I note on the bottom portion of Exhibit #27 a reference to 95 percent C.I. equals, and then—— A. Right. If you put a 95 percent confidence interval—out of this size sample of 162 fish your confidence intervals says if you went to the whole population that [587] the percentage of hatchery fish would between 41 and 59 percent.

Q. That confidence interval is combining the two seasons. A. Yes.

Q. Now, you indicated you had run these figures for various streams and rivers in Western Washington. A. Yes.

Q. In terms of percentages? A. Yes.

Q. Do you find that the percentage of wild fish reflected on this study for the Puyallup River is higher or lower, generally, than other streams and rivers for which there is a steelhead planting program in Western Washington? A. This wild population seems to be a little higher.

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TESTIMONY OF MR. GARY ELLIS, CALLED AS A WITNESS BY THE INTERVENOR NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED

Direct Examination By Mr. Willner

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[593] Q. Do you hold a position in the Northwest Steelheaders, Council of Trout Unlimited? A. Yes, I'm Washington State president.

Q. Were you elected to that position? A. Yes, I was.

Q. How many members approximately does the Northwast Steelheaders, Council of Trout Unlimited have in the State of Washington? A. Three thousand.

Q. Do you know who those members are? A. We have a wide range of membership. We have members from throughout the State of Washington.

Q. You have members in every county of the State of Washington? A. Yes, every county.

Q. Do you keep any records on describing who they are? A. No. We have their name and addresses. Briefly, I know we have members that are of probably every race; we have members who are—for instance, I have a chapter president who is a Japanese-American, I have a chapter president who is a Mexican-American, chapter president in Toledo who is an American Indian.

THE COURT: Toledo, Washington?

[594] THE WITNESS: Toledo, Washington, yes. A. (Continuing) we have an Oregon State Director who is a black man. I know that among my members I have loggers, doctors, lawyers and quite a wide range of people who are interested in steelhead fishing.

BY MR. WILNER:

Q. What unites them all? A. Their love of the outdoors, fishing for steelhead generally.

Q. Do you have some estimate of how many of your members fish the Puyallup River? A. Well, we have probably somewhere over 500 members who live in the area around the Puyallup River. They fish it quite regularly. Then in the King County-Pierce County area or greater Western Washington area, I suppose, we have another 500 or so people who travel to the Puyallup to fish, so I suppose we have around a thousand members that fish the Puyallup River regularly.

Q. Where do you yourself live in relation to the Puyallup? A. I live on Waller Road which is about one mile from the lower Puyallup River. My house, my dining room overlooks the Puyallup and I can see the banks of the river.

Q. Do you yourself fish the Puyallup? A. Yes, I do.

Q. How frequently do you fish the Puyallup? A. Oh, I probably fished it 20 times this past season.

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[598] Q. And is the Northwest Steelheaders Council of Trout Unlimited the largest fishing organization in the State of Washington? A. Yes, we are.

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TESTIMONY OF MR. MARK SCHULLER, CALLED AS A WITNESS BY THE DEPARTMENT OF GAME

Cross Examination By Mr. Rodgers

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[624] THE COURT: Excuse me, Mr. Schuller.

As I understand Mr. Rodgers' question he wants to know whether this Department of Fisheries or Department of Game utilize this scale sampling in their management program.

THE WITNESS: As far as I know, they haven't.

BY MR. RODGERS:

Q. All right.

The next question is, you've mentioned two references indicating its use as a research technique. The question is, do you know of a single fisheries management program where scale sampling is regularly used as part of the management effort? A. I don't know.

Q. In fact, you know that it has not been used, is that correct? A. No, I don't know that.

Q. Is it fair to say that the techniques which you studied are still in the process of refinement? A. I would say they're as refined as they can be.

Q. Well, didn't you select this topic for—let me ask you this: Do I understand you are working on your thesis in this area? A. Yes.

Q. And that is towards what degree? A. Towards a Masters.

Q. And is it not a criterion for your thesis topic that a novel subject be scrutinized? [625] A. No, it is not necessarily that. I'm using a research tool that's been

used in another state. I would say the main difference in my thesis and a couple that came out of Oregon State were that I am—I'm using a tool that they used in their research but I'm breaking—I am looking at Washington State steelhead which have not been looked at in such a large scope.

Q. In the course of your examination of the circumstances under which this technique had been usd, you did look at all available literature, did you not? A. Yes, I did.

Q. Did you find anywhere in that literature any references indicating that it was regularly used as a management technique? A. No, I haven't.

Q. Do you know whether this work was funded in part by the U.S. Fish and Wildlife Services and Northwest Fisheries Program? A. Yes, it was.

Q. Incidentally, is your thesis completed yet? A. No, it isn't. All the analysis is done; all I have to do is write it up and it's partly written.

Q. It has partly been written you said? A. Yes, it is.

Q. So this means that it has not yet been reviewed by your thesis committee, is that correct? A. As a written manuscript, no; but as far as data analysis, yes.

Q. They have not approved this work for purposes of meet- [626] ing your thesis obligation as of yet, have they? A. Could you say that again?

Q. Yes. I want to know whether you are, on the basis of the work that you have done, now entitled to your degree toward which you were working at the University of Washington. A. No, I'm not.

Q. And of course it follows that this work has not yet been published in any scientific journal. A. That's right.

Q. Is it a fact that what has been publicly made available is essentially the exhibit that you prepared identified as 74-27 last week, this single piece of paper? A. That's right.

Q. Is it a fact that—as I understand it, you were the author of this exhibit, is that correct? A. Yes, sir.

Q. Mr. Schuller, when did you prepare it? A. I prepared that——

THE COURT: Excuse me, Mr. Schuller. What do you have reference to?

MR. RODGERS: This is the exhibit about which we were talking last week.

A. That was prepared Thursday before I came.

THE COURT: Excuse me. The number of that exhibit is——

Mr. RODGERS: #74-27.

THE COURT: All right, thank you.

BY MR. RODGERS:

[627] Q. Now, over what period of time did you do the scale analysis upon which this exhibit was based? A. One night and one morning.

Q. And when was that done? A. That was done Wednesday night and Thursday afternoon.

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[653] Q. Mr. Schuller, one last question, if you had flipped a coin for each of your 162 scale samples represented by Exhibit 74-27, heads for hatchery and tails for wild, about what results would you expect to get? A. Fifty percent, I guess.

Q. Just about what you got. A. Right.

[654] Q. Did you ever have the impression that you were flipping a coin as you read these scale samples? A. I used to kid a lot about it when I was doing my thesis most of the time. It was easy to joke about it, but no, I feel the scale reading is pretty accurate. Like I say, this is about the highest percentage of any river that I've looked at that had that high a percentage of wild fish.

Q. But you did joke about it, suggesting that you felt maybe it wasn't that accurate? A. I'm sure I did.

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TESTIMONY OF MR. JAMES HECKMAN, CALLED AS A WITNESS BY THE PUYALLUP TRIBE

Direct Examination By Mr. Rodgers

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[686] MR. RODGERS: Would Your Honor object if I made a detailed offer of proof?

THE COURT: Right. No, I would not object. As a matter of fact, I was going to suggest you make a specific offer so I know exactly where you're going.

MR. RODGERS: Thank you, Your Honor. The area that I purport to cover with Mr. Heckman is a general identification of the environmental factors [687] that have been significant in affecting the rearing and survival of steelhead on the river system. We had intended to commence at the higher parts of the river system and I would propose to ask Mr. Heckman a series of questions as to whether logging activities on the Puyallup River drainage basin had adversely affected the spawning and rearing habitat of steelhead. I would propose to ask secondly an identical question with respect to other activities including flood control developments, diversions for power, gravel operations, bank revetments——

THE COURT: Excuse me, what do you mean by that?

MR. RODGERS: Essentially the——

THE COURT: Diking?

MR. RODGERS: —channeling of particularly the lower reaches of the Puyallup. The same question with respect to industrial wastes, spills of toxic substances.

I would then move specifically, and perhaps we're in an area where there is not objection, I would against that background ask Mr. Heckman whether he could assign specific losses to each of these pollution causes and incidents that we have identified on the record. The answer

would be that presently we're unable to do so in specific terms and in specific numbers, although the parameters of a study could be so designed.

Against this background I would then turn to ask [688] Mr. Heckman the specific historical questions that Your Honor will recall that I asked Mr. Millenbach, and that was whether any fix could be put on the size of the natural run in the period of the 1850's, at the time of the negotiation and signing of the Treaty of Medicine Creek. It was expected that Mr. Heckman's answer would have been the same as Mr. Millenbach's, namely, that the assignment of specific numbers is unknown and impossible.

Against that background I would then ask whether Mr. Heckman could summarize the environmental factors that we have earlier addressed that have since modified the run since those days, and I would ask him—and I will specifically state what questions I would ask him—I would ask him whether he could think of a single environmental factor affecting the spawning and rearing of salmon and steelhead on the Puyallup River drainage system that is more favorable today than it was in the 1850's. I would ask him, is it fair to say that the balance of environmental changes on the Puyallup River system has been detrimental to the steelhead population. I would further ask him whether it is fair to say that the overwhelming balance of the environmental changes on the Puyallup have been detrimental to the steelhead population.

As to both those last questions I would expect that the answer would be affirmative.

That is, essentially the area, Your Honor, that we had hoped to cover in the direct testimony.

[689] THE COURT: My position remains the same. It just appears to me that you are in an area that is so speculative, really, that it is opinion testimony at its highest level of nothing but opinion. And as far as, in

my own opinion, having any weight, really, on the issues I believe I have to decide we would spend hours in an area which I don't think would be productive of any hard evidence that I would consider really admissible. An expert can give his opinion on anything but if it is too speculative then it is not admissible.

MR. RODGERS: The basic part of his testimony, Your Honor, would be based on specific observations on the environmental conditions on the Puyallup River system; actual work that he and his staff have done beginning with the White River and continuing down the river.

THE COURT: Well, I think you can inquire as to what they have seen insofar as this might presently—I don't think, Mr. Rodgers, we can go back and correct whatever was done in 1906. Nobody knows how many steelhead were around in those days, and whether or not that particular project itself may have killed off a billion of them; we don't know. Nobody knows that and we can't guess at it. Courts are not engaged in guesswork. We're here to secure evidence which is reliable and admissible.

On the point of what they observed on the Muckelshoot Reservation, if in fact this is about spawning [690] grounds so he can testify what he saw or some staff member saw about present situations which may indicate the State is doing something to damage the natural spawning grounds, he can go into that, but on a limited basis. Because as I understand it even now he couldn't tell me in percentage terms what affect this really has on natural runs, and when he can't answer that question—and I don't mean to be impolite to anybody, I know you fellows are all working toward some common objective but in a way you haven't quite gotten there yet with specific scientific data. Now I could be entirely in error but that, at least, is my situation. I'm not blaming anybody. You've got a big problem and there hasn't been enough money around to get it solved, so nobody knows how many fish are there

and how you are going to divide them up. My attitude is, we'll take the best evidence we can and come out with some kind of conclusion.

In that limited area, Mr. Rodgers, I will allow Mr. Heckman to testify.

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[726] Q. Mr. Heckman, to your knowledge what environmental factors adversely affecting the natural run of steelhead on the Puyallup—withdrawn.

Mr. Heckman, to your knowledge what environmental factors adversely affect the natural run of steelhead on the Puyallup River system?

THE COURT: Now, you understand that all right? Not theoretical or anything, but just what you folks have observed on that river that in your opinion is going to cut down the natural propagation of steelhead.

A. Yes, I believe I understand it. I might as some back-up here note to the Court that I have——

MR. WILNER: If Your Honor please, I object to the witness giving us a lecture; I hoped he could answer the question.

[727] THE COURT: I think he is going to answer the question, Mr. Wilner. I'll overrule the objection. Go ahead.
A. (Continuing) I wanted to note that I have been chairman of the White River Fisheries Improvement Committee since aproximately 1968 and as chairman of that committee I have first-hand communication with representatives who are members of the Department of Fisheries and Game and Ecology, as well as the Corps of Engineers. We have noted in that committee that logging on the upper watersheds of most of the tributaries to the Puyallup system has been extensive and caused considerable damage in the form of excessive siltation in the streams and removal of the tree canopies along the streams causing

increased temperatures; the siltation, of course, causing direct losses to incubating eggs in the gravel because of cutting off circulation and suffocation of the eggs. We, in our staff, in our spawning ground surveys which have been continuing for salmon and steelhead now for approximately four years have noted gravel operations in the river both on the White River and the main stem Puyallup, channelization of the stream and bank revetments——

THE COURT: Where?

THE WITNESS: Bank revetments, Your Honor, a good example is the lower most portion of the Puyallup River where the river has been changed from its natural course to a straight line ditch.

THE COURT: Who did that?

[728] THE WITNESS: I'm not sure, Your Honor.

THE COURT: When was it done? I don't mean to sound sharp. It is just as if you say it, it sounds like it happened yesterday or the year before.

THE WITNESS: It looks to me like it must have happened 30, 40 years ago.

THE COURT: I'm 53 and when I was a kid that was the same river, same dike. My point is, if somebody is going to get blamed for it, I think he's long gone.

THE WITNESS: I'm sure that's true, Your Honor, except we all support the Corps of Engineers and I suspect they probably had a great deal to do with it. There is a great deal of other flood control work in the form of channelization conducted by the cooperative, Pierce and King Counties.

THE COURT: Excuse me, flood control is necessary to save these fish too, isn't it? Isn't flooding bad for fish?

THE WITNESS: Flooding can be detrimental in a natural state, however, mother nature seems to have figured out a way to take care of the fish, and in the case of steelhead in particular this is a species that largely utilizes the upper tributaries and spread out this way. They are not subject to the gross damage that would occur to a species spawning in the main stem where the bulk of the water would come down and scour the eggs out. So, one way or another she's spread them out and has protected them. The bank [729] revetment work that occurred along the Puyallup River upstream and along the White River in the neighborhood of Lake Tapps where White River takes the big curve around there, the banks have been shored up with concrete and rocks and this eliminates the water hedge of the river and destroys a good number or a good portion of the natural habitat that the young fish would use for rearing where the food production would occur.

Of course Mr. Millenbach mentioned the Puget Sound Power and Light projects on both the Puyallup River and White River that divert large portions of the water through power projects. On the main Puyallup, the Electron project, a good amount of water is diverted; I don't know exactly how many miles, but a number of miles down to the Electron power house and this reduces the quality of that river habitat. I am very much familiar with the White River situation and have presented written testimony regarding it for a Federal Power Commission hearing coming up on July 30th. We're aware that the 30 cubic feet per second——

THE COURT: Excuse me. Aren't the rest of these dams all under Federal Power licenses?

THE WITNESS: No, sir. I don't believe that either Electron or the Buckley project is under licensing and that's what this Federal Power Commission hearing is all about. The company made application for a license and

then it came under review, the Department of Fisheries and Game intervened in the application—[730] in the issuance—and then the Muckelshoot Tribe gained intervention and about that time Puget Sound Power and Light attempted to withdraw their application and all the parties intervened in the withdrawal. The problem here is, as Mr. Millenbach pointed out, the company diverts almost all of the water, particularly during the low flow period of the year through the flume to Lake Tapps and then down through Lake Tapps and Darringer and through the power house. This literally dries up about 21 miles of river and 30 cubic feet doesn't do the job. We found that you need more in the neighborhood of 200 to 500 cubic second feet to secure both fish passage and maintain the spawning and rearing habitat. There is no question but what the Corps of Engineers Mud Mountain Dam on the White River has caused numerous problems. The desilting of the reservoir at times has caused extensive siltation of the river downstream and has—we and the Fisheries Department have direct evidence of losses of downstream fish and salmon. This pretty well covers it, except I could mention the pollution problems in the lower river near the towns of Puyallup and Tacoma, industrial and domestic pollution.

BY MR. RODGERS:

Q. Are you saying, Mr. Heckman, that industrial pollution as well as the other factors you have identified have an adverse affect on the natural run of steelhead on the Puyallup. A. I would feel definitely that they do. I have examined the [731] records of the Department of Ecology which notes positively that fish kills have occurred in the area of Tacoma as a result of pollution.

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TESTIMONY OF MS. RAMONA BENNETT, CALLED AS A WITNESS BY THE PUYALLUP TRIBE

Direct Examination By Mr. Rodgers

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[755] Q. Ms. Bennett, could you please tell the Court and parties how many members of the Tribe there are? A. The United States Government for the purposes of tribal government support at this point recognize 850 members. Indian health carries 600 members as eligible for services, medical services. We're currently involved in bringing our rolls up to date. We haven't had a certified roll since 1929 and we're finding that there are considerably more than 600 Puyallups living within the reservation boundaries or service area.

Q. Now is the 850 number recognized for purposes of participating in Tribal government? A. That would be right, with some 320 voting members.

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[761] Q. Do you know whether any members of the Tribe are also sports fishermen? A. There are some sport fishermen.

Q. Now Ms. Bennett, let me ask you, currently and traditionally do your people have a way of guaranteeing escapement for spawning purposes of a steelhead run or other salmon runs? A. Yes.

Q. Could you describe to the Court how that was done? A. Well, when Mr. Millenbach was on the stand he was saying that the ideal situation would be to have a gate across the mouth of the river so fish could just literally be counted as they came through. He kind of made me smile because that's exactly what the Indian traditionally had. We had traps at the mouth of the river and we would do a harvest, but we would also be able to guarantee that fish were getting back to natural spawning areas. I think it was the State that made us take down that same gate that Mr. Millenbach recommended.

Q. Ms. Bennett, to your knowledge has the Indian fishery on the Puyallup River ever destroyed a run of steelhead or any other species? A. No.

Q. Ms. Bennett, is it the Tribe's intention to destroy such a run? A. No.

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[767] Q. Tell me what the evidence of over fishing would be that would be evident to a fisherman. A. Simply poor catches. The fishermen know that river they've been in many cases fishing on that river since they were very young boys. They know what a good run looks like and they know what it feels like in terms of catches for drift or in terms of the number of fish in a net at the end of the tide from a set. And the fishermen themselves give us the best indication of the strength of a run, and in fact have come us requesting emergency closures—a shortening of the number of days on the river or pulling their nets entirely; just saying, you know, the non-Indian commercial fishermen have already destroyed this run and [768] just back-off the river entirely.

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[773] Q. Now, Ms. Bennett, perhaps we could speak generally without particular reference to this document. With respect to the Tribe's steelhead harvest of the future what percentage of it would you estimate is likely to be taken within the boundaries of the reservation as defined by the 9th Circuit? A. Ninety percent; pretty close to all of the steelhead fishing.

Q. In some years would you estimate that the on-reservation would be a hundred percent? A. That would be very possible.

Q. Could you please explain the basis for your answer? A. Because the steelhead all go through the Puyallup Reservation.

Q. And consequently is the fishery more easily secured from points on the reservation than off the reservation? A. That would be right.

Q. You are likely to have a more productive fishery on the reservation than, for example, out in Commencement Bay? A. It's much easier to fish in the river; it's much more convenient and it's largely been where the steelhead catch has taken place.

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Direct Examination By Mr. Sennhauser

[777] Q. The Ordinance No. 200 which is dated December 8, 1971, am I to understand that this is still in effect? It is not an ordinance which has lapsed, but is a continuing regulation and ordinance? A. It's continuing.

Q. So it is in effect today still? A. Yes.

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Cross Examination By Mr. Mackie

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[780] Q. Now, the Tribe with the Tribal council, do you have any enforcement officers who are retained by the council? A. Not at this time.

[781] Q. Have you had in the last ten years enforcement officers employed or retained or deputized by the council? A. We've had fishermen authorized by ourselves to do regular reviews of fishing practices and to report violations back to the Tribal council, but we've not authorized arrests, for instance, of Indians or non-Indians that were creating problems. We have had to call the Department of Interior and other tribes for the loan of officers at different points, but that would be not for fishing.

Q. If a member of the Tribe engages in a net fishery in Commencement Bay area which is closed by this 1971 Ordinance, what enforcement action is taken by the Tribe with reference to the individual who is a member of the Tribe fishing in that closed area? A. The Tribe has at different times waived that closure or altered the boundaries that were within Tribal consent. For instance, last year some

half a dozen fishing people were authorized by the Tribal council and the fish committee, collectively, to move on out a quarter of a mile outside of the mouth of that river to do their family fishery.

Q. Your answer has been in terms of the adjustments that you made by opening an area. My question is in terms, if an individual fishes an area which is closed which the Tribe has not opened, for example in Commencement Bay, what enforcement action is taken by the Tribe with reference to that individual? [782] A. There has been no fishery that has not been recognized and approved by the Tribal council. The individual fishermen come and give us their plan, what they intend to do and if we don't approve it we tell them what we would approve and they conform to that.

Q. Do you do this in terms of amending your ordinance or is this some form of oral permission given to an individual? A. Usually just a meeting with records kept of who is going to be fishing where and what days, and what we did have to do was—because we didn't really know how the runs were going to be; we didn't know what the strength of the runs were going to be. We had them start out on a three-day week instead of a four-day week with that fishery and just kept them at three days.

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[784] Q. During the Tribal considerations of fishing regulations have you established any mechanism for Tribal members to report their fish catches to the Tribe? A. Day by day the buyers, the fish buyers make that information available to us on request.

Q. Do all of the Tribal members then sell to the same fish buyers? A. Well, there are just a limited number of fish buyers that will manage the Puyallup steelhead catches.

Q. And you have then no direct reporting requirement by individual fishermen to the Tribe as to the size of their catch. A. Well, for instance, this last——

Q. Excuse me, if you can answer the first question yes or no—— A. We don't have anything set up yet for this year but last year we did have a reporting system.

Q. A direct reporting system from the fishermen to the Tribe as to the fisherman's catch? [785] A. That would be right.

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[787] Q. That is simply the end of the season, but if it's not your recollection—now, did members of the Tribe continue after the end of the season set by the Department of Game to fish commercially by net for steelhead on the Puyallup River? A. The Tribal fishermen continued fishing under Tribal regulations on the Puyallup Reservation.

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[788] Q. Now, the Tribal policy communicated to the Department its intention to take 5,000 steelhead from the watershed for the following year, is that correct? A. Yes.

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[789] Q. With that as the premise, I'm asking, did the Tribe through any means make an advance prediction as to the total size of the anticipated winter steelhead run for the 1974-75 season? A. I think by these other exhibits you can see that we were trying to secure run size predictions or something firm, beyond estimates, from the State Game Department which would have been the only logical supplier of that kind of data. Since it was not available through that agency we will have to maintain a tight monitoring and surveillance on our fishermen and simply be prepared to back down from that figure. We can't make a prediction like that. We needed precise figures from the Game Department.

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[790] Q. Now, your letter also indicates that you have present intention to annually increase the maximum number of steelhead that you anticipate taking by 1,000 per year; is that accurate? A. Yes, that is.

Q. Have you examined the watershed and the steelhead resource to make predictions as to subsequent run sizes of steelhead on this watershed? A. We are going to be very actively involved in the restoration of watersheds and some——

Q. Excuse me, I'm not asking you about what your intentions are in the future; I'm asking in terms of whether you have at the present time studied it to determine those potential run sizes for future years to reflect your desire to increase by 1,000 per year the catch [791] that you will take of steelhead? A. No. You have to understand that the whole reason for predicting or declaring increased fisheries over a period of years is because the restoration and protection of the watershed and the river as a resource has got to be one of the logical steps in preparing the resource for that kind of fishery. See, through the——

Q. Excuse me, are you anticipating then a growth in the size of the steelhead run on the Puyallup watershed in the nature of 1,000 fish per year or some lesser or larger number? A. We see as on of our responsibilities making that a reality. That's part of our responsibility.

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Cross Examination By Mr. Tannesen

[794] Q. Initially I would like to direct your attention to what marked as Defendant's Exhibit P, and referring to what is page 4 of that exhibit under Article VIII where it indicates, "No set net shall be longer than 60 feet." In addition I would like to also refer you to the exhibit which has been entitled "Treaty Indian Gill Net Fishing Seasons for Steelhead" which were passed by the Department of Game on—anyway, which covered the period from December 1, 1973 to January 17th of '74, and that portion of the exhibit which indicates that no set net shall

exceed 150 feet in length. Would it be a fair assumption from this that the Puyallup Tribe agrees that there should be some regulation of the length of the set net? A. Oh, yes.

Q. And would it also be fair based on the fact that in paragraph—rather, Article VIII of Defendant's Exhibit #74-P, Article VIII, three, that provides, "No set net shall extend more than one-third of the distance across the river," and then referring also to the regulations issued by the Department of Game which I just referred to, paragraph II, sub paragraph 3, which provides that set nets may not extend more than one-third of the width of the stream where fished, would it also be fair to assume that the Puyallup Tribe agrees that this is a necessary regulation? A. You mean the one-third of the distance? [795] Q. Yes. A. Yes.

Q. The answer was yes? A. Uh hum.

Q. Then you would basically agree that there is a conservational necessity for regulations of this type. A. Yes.

Q. Now, you testified that on occasion a fisherman will cease fishing, an Indian fisherman of the Puyallup Tribe, if he feels there is a "poor run." A. Yes.

Q. Now, on these occasions is there any data which is taken to make this determination of the fact that there is a poor run? A. Can you please repeat your question?

Q. Yes, my question—— A. Just the part that you want answered.

Q. The question then was, do you take any sort of data to make the determination that there is a poor run which impel you or members of the Tribe to cease fishing? A. No data is really required. It costs a lot of money to run a motor and that's hard work. If the catch is light and if it's not profitable, if the fish seem to require not being fished the fishermen just let us know that and they collectively pull their nets and get off the river.

Q. Would it be fair to assume, then, that the cessation of fishing on the river is more geared to the fact that [796]

it isn't economically feasible at that point for a fisherman to expend funds in terms of gasoline and that this is the reason why the fishing would be ceased at this point? Is that correct? A. Well, just that both things are taken into consideration. The fishermen know themselves when a run is phasing out or coming in weak or in jeopardy midseason, and usually that kind of an indication then results in the Tribal government cutting out a day or closing two days of the regular fishing week so that those fishermen that prefer to stay on the river can go on ahead and be involved in a fishery harvest, but you know we listen to what our fishermen are telling us and we respond accordingly.

Q. Wouldn't it be a fair statement to say when the Tribal government decides to cut out a couple fishing days it's true then they depend on the recommendations of the fishermen? A. That would be right.

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[798] Q. Would it be fair to say that you are familiar with the net fishing practices of the Puyallup Tribe? A. Pretty much so.

Q. Could you give me some idea of what a Puyallup fisherman would consider to be an average set; that is, when he puts his net down and takes it up, what would be considered to be average in terms of number of fish while the fish are running which he could expect? A. You mean on a tide from a 60 foot net? Is that what you're asking?

Q. Yes. A. I don't know that; I don't know that there is an average.

Q. Could you give me some idea as to the upper number of fish that he might be able to catch? A. I don't know how much you understand about these fish but they move in patterns. An a real high tide on a rainy night he might have a net full of fish. The next day on the next tide there might be two or three fish.

Q. When you say a net full of fish, in terms of numbers of fish how many would this be; just a general approxima-

tion? A. Oh, I don't know. I couldn't give you weights or num [799] bers.

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Redirect Examination By Mr. Rodgers

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[804] Q. Ms. Bennett, do you conclude from this correspondence that as of this period of time neither the Tribe nor the Department of Game had information on the expected size of the run? A. I would say that's entirely true.

Q. With respect to a couple questions put by Mr. Tannesen, did I understand you—this is with respect to the length of the set net. Is it your understanding that those regulations include any purpose other than conservation? A. I think the Game Department authorized nets—what was [805] it, a hundred or hundred-fifty foot set nets?

Q. I believe the exhibit will show 150 feet. A. We set a 60 foot maximum length because that river has been dredged, and the only sets on that river are off those bridges and the bridges are pretty high up on the river. The river is fairly narrow where we're able to set. The natural eddies are gone; the river has been narrowed, and isn't a natural river any more. And at the points where we can have set nets off those bridges, you know, 150 foot would be much, much too long. It would do two things; it would go probably beyond a third of the width of the river and therefore would for conservation purposes simply not be too wise. But if you had two, 150 foot nets, one off each side, you would have no channel for drifting. So, a 60 foot maximum was necessary to accommodate the fishermen that drift that river, and additionally to allow escapement of that Puyallup River.

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Questioning By The Court

[822] Q. . . . if you anticipate you are going to catch 5,000 steelhead, what is your anticipation of the steelhead, therefore, that will be allowed to escape up the river through your regulations so they'll spawn and come back and, in effect, be a return crop the following year?

THE WITNESS: Absolutely no escapement figures necesssary are available to myself through any agency or my own knowledge; escapement to either hatchery facilities or natural spawning areas. No figure has been established and that's the blank. That's the other column that should be here, what actually escaped and what was needed to escape and what the spawning ground will actually support.

THE COURT: Then you and your people actually do not know how many steelhead this would allow to go up to spawn and then return, do you?

THE WITNESS: That's why we're making our communication with the U.S. Fish Wildlife Service.

THE COURT: But the answer to my question please is yes or no, you don't know.

THE WITNESS: There are no figures available.

THE COURT: All right, thank you.

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TESTIMONY OF MR. HENRY ADAMS, CALLED AS A WITNESS BY THE PUYALLUP TRIBE

Cross Examination By Mr. Mackie

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[919] Q. Now, I concluded from your direct testimony and correct me if I'm wrong, that if there was an extremely large run of steelhead entering the watershed and the report was that it was possible to fish for more than 5,000 without in any way harming the run or chang-

ing in a sense your pre-set percentage of the harvestable fish, that you would in fact consult with others for consideration as to increasing that 5,000 maximum, is that correct? [920] A. We would respond to recommendations and requests from particularly State agencies that it's absolutely necessary that you increase your quota, or raise your level of catch because if you don't do that, one, the sports fishermen aren't going to catch salmon and they're just going to over-populate the spawning areas, then we would undertake to crop and cultivate a greater amount of steelhead.

Q. Does your long answer translate to a yes? A. Not a definite yes to the question you asked.

THE COURT: The fact of the matter is, the council at least in your opinion and the council's opinion have the right to change that quota to suit themselves regardless of what information they get. They have the right to do that, isn't that right?

THE WITNESS: No. The right, as Ms. Bennett indicated, has ingredients of responsibilities and obligations and the right—they have the power to do it but not necessarily the right.

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[926] Q. Do you—have you taken intensive courses in fisheries or fisheries management in college? A. No. The closest I came to it was a roommate who was a fisheries major, no courses in fisheries.

Q. Do you purport to have specialized knowledge in terms of fish biology and management? A. No, I do not purport to have either of those, but I'm not totally ignorant of some things that can be learned about management.

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[927] Q. Mr. Adams, were you able during the lunch break to obtain the list of registered fishermen with the

Puyallup Tribe? A. Yes, I was able to secure a list; it isn't the formal registration list. It is not the formal registration list because that is not in the Tribal records for the probable reason that the Tribal official who was registering did leave the State earlier this year and apparently did not leave any formal registration list.

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Cross Examination By Mr. Willner

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[930] Q. All right. Now I notice on Earl Youell and Warren Bliner the notation that they are not Puyallup but married to Puyallup. Does that mean if they are [931] married to Puyallups they have Indian Treaty fishing rights? A. Indian persons married to Puyallups living with and supporting the family, whether it be just a wife or be wife and children, have been accepted into Puyallup Tribal relations and to exercise an acquired right to take fish with authorization from the Puyallup Tribe.

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[934] Q. Benny Reed Jr., I notice, is the first name added in ink. There's a series of names in typewriting and then some names in ink. When were the names in ink added to that list? A. The names in ink were added to this list today at my request. I previously had the typewritten list.

Q. When was the typewritten list made up? A. It was made up, if I recall correctly, in late April—possibly the first week in May at the latest.

Q. And the typewritten list headed "Puyallup Fishermen," is that correct? A. That's correct.

Q. All right. Now the names starting with Benny Reed Jr. and the rest of the names in ink, were they all added to the list this noon hour? A. Yes, it was a correlation of, I think, at least two and no more than three lists which had been prepared at my request earlier attempting to

identify and secure full information on who would be fishing in the coming season.

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[939] A. Well, I would assume on the basis of previous experience with the Tribe that somewhere between 300 and 400 of the membership live within a 20-mile radius from [940] the former Cushman Hospital and that several hundred others live beyond that, ranging to Seattle and then scattered around other places in the United States.

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TESTIMONY OF MR. JAMES HECKMAN, CALLED AS A WITNESS BY THE PUYALLUP TRIBE

Cross Examination By Mr. Mackie

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[1005] Q. Do you believe that the planting of steelhead by the Department of Game in rivers which border on or go across reservations areas benefit the Indian catch in those areas? A. Yes.

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[1015] Q. No, I believe it has reference to the distribution of the steelhead once they are commercially caught by Indians in the watershed.

THE COURT: Apparently he didn't mean they were swimming up the river underground; it was after they were sold that they were surreptitiously disposed of, I suppose. Is that correct, Mr. Mackie?

MR. MACKIE: I believe that's what the reference was to.

A. I see, if that's what I said I probably was referring to the fact that all of the steelhead that are caught by the Indians are not sold directly to licensed buyers and do not become a matter of record.

BY MR. MACKIE:

Q. Some of those are sent directly out of State? A. I understand that some are, yes.

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[1029] Q. Do you recall in 1971, after conferring with the Department of Fisheries with regards to the 1971 Chinook run on the Puyallup, recommending to the Puyallup Tribe that they reduce their fishing days on that particular fishery? A. Yes. I have been in consultation with the Fisheries Department and conveyed to the Puyallup Tribe, both the fish committee and the council, the information that the Department of Fisheries expected a very low [1030] run of fall Chinook salmon.

Q. Did you pass on to them at the same time recommendations for some curtailment of their fishing activities on that Chinook run because it was anticipated it would be very low? A. Yes, I did.

Q. Did the Puyallup Tribe make those reductions? A. Yes, they made a reduction in their weekly fishing time, from five to four days.

THE COURT: Did you recommend a specific closure?

THE WITNESS: Yes, Your Honor, I did recommend that they reduce it to three, and I had conferred closely with both the director and the assistant director of the Department prior to that, and they felt this would be a reasonable reduction in the fishery.

BY MR. MACKIE:

Q. Was the reduction—did the reduction made by the Tribe coincide with the reduction that you suggested? A. No. I suggested a reduction of two days and they finally——

THE COURT: Two or three? I think you said three before.

THE WITNESS: They were fishing five days a week. I recommended that they fish three days and they concluded by modifying their regulations to allow a four-day week fishery.

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[1034] Q. Now, you still in terms of 1973 have not answered whether the Indians on the Puyallup accepted your recommendation for the reduction on the 1973 Chinook fishery. A. I spoke to Ms. Bennett and to the chairman of the Puyallup Tribe and I relayed to them the information that had been provided to me by Fisheries and they chose not to reduce their fishing time, as I recall it.

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[1048] Q. Now, are you aware of the average size of steelhead which are harvested in the Puyallup water basin? A. I am generally familiar with the average size of steelhead but, no, I have not sampled the landings in that system to be able to come up with an average size, no.

Q. Would it be a general approximation for size in your best estimate in the range of eight to ten pounds per steelhead in that system? A. In the net fishery?

Q. Yes. A. Yes, I think that would be close.

Q. Are you aware of the commercial price for steelhead in Western Washington through the fish buyers over the course of the last fishing season per pound? A. Yes, I am. I didn't conduct a survey of buyers to determine what it was, but I incidentally heard what some were paying.

Q. Could you tell us approximately what those price ranges were per pound? A. I recall prices in early January of a dollar to a dollar twenty per pound. This is fish to the buyer, or pardon me, to the fisherman for fish in the round, the entire fish before it's been dressed.

Q. So on this then the average for a steelhead would have been somewhere around $10 in terms of its [1049] commercial price? A. If we're talking of ranges and you indicated eight to ten pounds, it would be eight to ten dollars.

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EXHIBIT 74-2

Puyallup River System Steelhead Plants and Catch

Winter Season	Cycle Plant [1]	Indian [2]	Sports	Total
1947-48			1,937	1,937
49			4,644	4,644
50	52,000		7,443	7,443
51	18,000		6,037	6,037
52	33,000		15,660	15,660
53	66,000	104	15,566	15,670
54	74,000	2,671	19,296	21,967
56	47,000	2,308	20,348	22,656
56	47,000	2,308	20,348	22,636
57	70,000	2,554	14,184	16,738
58	57,000	2,960	8,794	11,754
59	58,000	2,740	7,528	10,268
60	55,000	4,506	9,547	13,053
61	63,000	2,917	4,684	7,601
62	79,000	2,629	10,419	13,048
63	57,000	1,834	11,717	13,551
64	65,000		15,942	15,942
65	63,000		6,914	6,914
66	93,000		18,761	18,761
67	65,000		15,971	15,971
68	100,000		16,971	16,971
69	67,000		11,602	11,602
70	98,000	500	6,738	7,238
71	124,000	1,500	12,101	13,601
72	123,000		9,648	9,648
73	122,000	1,105	4,015	5,120
74	107,000			
75	75,000			
76	68,000			

[1] Cycle plants made 2 years prior to winter season, i.e., cycle plant of 52,000 (1950) was made in 1948 and contributed to the catch of 7,443 fish in 1949-50 winter season.

[2] Data represents White River and Puyallup Indian catch as available and is incomplete.

EXHIBIT 74-29

Puyallup Fishermen

Frank Wright Sr.		*Ray Turnipseed N-II* *married to Bertha Turnipseed, Puy*
Frank Wright Jr.		
Arnold Williams Jr.		
Arnold Williams Sr.		
Harry Dillon		*Mike Turnipseed*
Herman Dillon Sr.		*Mac Turnipseed*
Frederick Dillon		*David Turnipseed*
Don George Jr.		*Katherine Turnipseed*
Richard George		*Bobby Thomas*
Ben Wright Jr.		*Melvin Iyall*
Ben Wright Sr.		*Charlie Cantrell*
Earl Youell *N-I*	*not Puyallup but married to Puyallup*	*Wayne Cantrell*
		Jimmy Siddle
Warren Bliner *Skokomish*		*Jimmy Siddle Jr*
		Robert Satiacum
Harold Farris		*Robert Satiacum Jr*
Vernon Cross		*Charles Satiacum*
Tom Dillon		*Chester Satiacum*
Larry George		*Dolores Satiacum*
Jerry George		*Shirley Satiacum*
[Leo Daniels]	*Muckleshoot married to Puyallup*	*Danny Satiacum*
		Karen Satiacum
[Roger Jackson]	*Quileute married to Puyallup*	*Jack Starr Moses*
		Joe Earl married to Puyallup
Rev. Jack Moses		*Linda Earl*
Joe Moses		*Dorothy Earl*
Charlene Williams		*Joe Earl Jr*
[Tom Cummings]	*Oklahoma Indian married to Andrea George, Puy*	
Joan Dillon		
[Joe Peterson]	*Nez Perce married to Card George, Puy*	
Silas Cross Sr.		
Silas Cross Jr.		
Benny Reed Jr.		

Note: Italics indicate handwritten words on original.

Supreme Court, U. S.
FILED
NOV 4 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-423

PUYALLUP TRIBE, INC.,
and
RAMONA BENNETT,

Petitioners,

v.

DEPARTMENT OF GAME OF
THE STATE OF WASHINGTON,

Respondent,

and

NORTHWEST STEELHEADERS COUNCIL OF
TROUT UNLIMITED and GARY ELLIS,

Respondents.

RESPONSE TO A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

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Gary Ellis

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-423

PUYALLUP TRIBE, INC.,
and
RAMONA BENNETT,

Petitioners,

v.

DEPARTMENT OF GAME OF
THE STATE OF WASHINGTON,

Respondent,

and

NORTHWEST STEELHEADERS COUNCIL OF
TROUT UNLIMITED and GARY ELLIS,

Respondents.

RESPONSE TO A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

Respondents Northwest Steelheaders Council of Trout Unlimited and its president, Gary Ellis, who were granted intervenor

status in this case by the Superior Court of Washington on May 1, 1974, respectfully join petitioners in praying that a writ of certiorari issue to review the judgment of the Supreme Court of Washington entered in the above-entitled case upon denial of a motion for rehearing on June 25, 1976. Respondents pray that the entire judgment be reviewed by this Court, not just the one aspect singled out by petitioners.

OPINIONS BELOW

See the Petition of Puyallup Tribe, Inc., et al, and the Injunction Order of August 13, 1976 entered by the United States District Court for the Western District of Washington at Tacoma (Judge Boldt) appearing in Appendix A.

JURISDICTIONAL GROUNDS

See the Petition of Puyallup Tribe, Inc., et al, and the Complaint in Intervention of Northwest Steelheaders, et al, in the Superior Court appearing in Appendix B.

QUESTIONS PRESENTED

1. May the state of Washington manage the entire steelhead resource of the Puyallup River in the interest of conservation?

2. Should the hatchery steelhead on the Puyallup River which are paid for with the license fees and tags of sports fishermen be excluded from the commercial fishery of the Puyallup Tribe?

3. Does the treaty language "in common with all citizens of the territory" grant to the Puyallup Tribe any specific allocation of steelhead on the Puyallup River?

4. Does state management of the steelhead resource in the interest of conservation allow regulation of season, gear, and

area of fishing, rather than solely assuring an adequate escapement?

TREATIES AND STATUTES INVOLVED

See the Petition of Puyallup Tribe, Inc., et al.

COUNTER STATEMENT OF THE CASE

The steelhead is a sea-going rainbow trout which originates in Washington rivers, goes to sea, then returns almost always to the river of its birth to spawn and usually to die (Finding V; Tr 109). Since 1933, Washington state law has made steelhead a game fish to be caught only with hook and line RCW 77.08.020. The Department of Game of the State of Washington has "the responsibility for the management and conservation of the steelhead resource in this state," (Finding III; RCW 77.08.020 and 77.12.010). Most of the budget of the Department comes from the earmarked license fees paid

by sportsmen (Finding IV; Tr 162). Also since 1933, the Department of Game has operated a hatchery program for the artificial propogation of steelhead trout (Tr 147). The hatchery program for the Puyallup River is "virtually entirely financed" by sports fishermen (Finding X; Tr 143, 145, 240).

Northwest Steelheaders Council of Trout Unlimited (intervenor), the largest sports fishing organization in Washington, is dedicated to the conservation of steelhead trout and other fish. Gary Ellis (intervenor) is the Washington state president of the Northwest Steelheaders and a sports fisherman on the Puyallup River (Complaint in Intervention). There are about 150,000 licensed steelhead fishermen in Washington, of whom 5,171 fish the Puyallup River (Finding XIX; Ex 74-17; Tr 508).

Puyallup Tribe, Inc. is a corporation

composed of the 850 members of the Puyallup Tribe of Indians (Tr 755). The Puyallup reservation consisting of 18,000 acres at the first seven miles at the mouth of the Puyallup River was sold in 1903 except for 22 acres used as a cemetery (Finding XII in first trial). Members of the Tribe live in Tacoma, and other Washington cities and towns (Tr 939). Twenty tribal members regularly, 20 more part-time and 20 occasionally fish the Puyallup River commercially (Finding XV; Tr 758, 759). These 60 include in the number spouses and children and the official roll shows a total of 20 separate family names (Ex 7429). Puyallup Tribe members also fish with hook and line, and in accordance with Washington law do not pay the license fee paid by other hook and line fishermen (Tr 166, 761). Ramona Bennett is the chairperson of the Tribe (Tr 754).

In 1855 the United States and the ancestors of the Puyallup Tribe signed the Medicine Creek Treaty which included the following language:

> "The right of taking fish, at all usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the Territory" (10 Stat 1132)

The prior decisions of this Court established that members of the Puyallup Tribe, Inc. had the right to fish commercially for steelhead trout despite the Washington statute which made steelhead trout solely a game fish. These decisions also provided that the state of Washington had the right to regulate the tribal fishery in the interest of conservation. This case was remanded to decide whether hatchery fish were included within the 1855 Treaty, to determine a method of allocating the steelhead run on the Puyallup River between the Puyallup Tribe and the sports fishermen, and to

adopt a program of management of the resource in the interest of conservation. Puyallup Tribe, Inc. v. Department of Game, 391 US 392, 88 S Ct 1725, 20 L Ed 2d 689 (1968) (Puyallup I); Department of Game v. Puyallup Tribe, Inc., 414 US 44, 94 S Ct 330, 38 L Ed 2d 254 (1973) (Puyallup II).

A recent Ninth Circuit decision in which these intervenors were not parties has determined that the Puyallup reservation sold in 1903, and now covered with private land holdings in the city of Tacoma, continues to exist. U.S. v. Washington, 496 F 2d 620 (9th Cir 1974); cert den 419 US 1032 (1975). Another case in which these intervenors were not parties at trial provides for this allocation of salmon on the Puyallup River to the Puyallup Tribe: (a) 50% of all the salmon that reach the Puyallup River ("usual and accustomed grounds and stations") and whose escapement is not necessary to preserve the run,

plus (b) all salmon caught for subsistence, plus (c) all salmon caught for ceremonial purposes, plus (d) all salmon caught with hook and line in sports fishing season, plus (e) all salmon caught as part of the regular commercial fishery (in the ocean), plus (f) all salmon caught on the reservation, plus (g) compensatory fish for all salmon originating in Washington waters which are caught in the ocean by American non-treaty commercial fishermen. U.S. v. Washington, 384 F Supp 312 (W.D. Wash 1974); aff'd 520 F 2d 677 (9th Cir 1975), cert den 96 S Ct 877.

Most of the commercial fishery is for salmon. The total annual steelhead catch in Washington of 246,000 compares with the salmon catch of 7,777,000 (Tr 210). The federal courts have given to the Puyallup Tribe most of the salmon fishery of the Puyallup River. The steelhead fishery on the

Puyallup River which is at issue here is comparatively small (Tr 943, 1061).

In this case, Superior Court Judge Brown held in accordance with the concurring opinion of this Court which was not questioned by the majority opinion that (to quote Mr. Justice White):

> ".....the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen."
> (Department of Game v. Puyallup Tribe, 414 US 44, 49 (1973))

Judge Brown found that the hatchery fish are distinguished by a stubbed dorsal fin (due to crowded conditions in the hatchery) and different growth rings on the fish scales (since hatchery fish usually migrate to the ocean at the end of one year of life instead of two years), (Finding XI; Tr 106, 176, 574). Though hatchery fish cannot be distinguished until caught, they can be

statistically separated by proportion in the total run.

Judge Brown found that the average annual run of steelhead on the Puyallup River consists of 14,715 hatchery fish and 14,715 natural fish by taking the average run during a 10-year period when there was adequate Indian reporting. Allowing a 50% escapement of natural steelhead for conservation purposes, he allocated the Puyallup Tribe 45% of the natural harvestable run, or 3,310 steelhead. He retained continuing jurisdiction of the case. (Findings XII, Ex 74-2, Tr 357).

The Puyallup Tribe appealed from the Superior Court decison. The Department of Game and Northwest Steelheaders cross-appealed solely from that part of the decision in which the court made a specific allocation of the natural run, rather than setting guidelines for an annual allocation

by the Department of Game, subject to court review.

The Supreme Court of Washington en banc unanimously affirmed Judge Brown except that it ordered the Department of Game rather than the Superior Court to determine the numbers of natural run steelhead to be included in the Puyallup Tribe allocation for future years. Department of Game v. Puyallup Tribe, Inc., 86 Wash 2d 664, 548 P 2d 1058 (1976).

The majority opinion of Justice Hunter stressed:

(1) The Treaty language "in common with all citizens of the territory" in accordance with the opinion of this Court in Puyallup I, does not grant to the Puyallup Tribe any specific allocation of steelhead on the Puyallup River but rather guarantees the members of the tribe who were not then citizens equal rights with citizens. This is supported by the language of this Court in Puyallup I "that any ultimate findings on

the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with'." Otherwise citizens who are Indians would be favored over citizens who are not Indians, in violation of the equal protection clause.

(2) The hatchery steelhead which are paid for with the earmarked license fees and tags of sports fishermen should be excluded from the commercial fishery of the Puyallup Tribe both as a matter of treaty interpretation and equity. The treaty did not contemplate Indian rights in artificially propagated fish since none then existed. Furthermore, providing hatchery fish for the commercial nets of the Puyallup Tribe would be a subsidy from the sportsmen who pay for the hatchery program.

(3) Then recognizing that the opinion of this Court in Puyallup II unless changed mandates an allocation, the decision of the

Superior Court that 45% of the natural run should be awarded to the Puyallup Tribe is affirmed as a matter of equitable discretion.

(4) The state of Washington has the duty of managing the entire steelhead resource of the Puyallup River in the interest of conservation.

The concurring opinion of Chief Justice Stafford stresses that this Court has mandated an allocation of the steelhead resource and then agrees with points (2), (3), and (4) above.

The concurring opinion of Justice Rosellini agrees with point (1) above, and stresses that the treaty language "in common with" means a fair opportunity to catch fish and not any specific allocation. He also notes that management of the steelhead resource in the interest of conservation allows regulation of the

manner of fishing, rather than solely assuring an adequate escapement.

After the decision of the Washington Supreme Court the Puyallup Tribe stated that it would seek certiorari against both the exclusion of the hatchery steelhead from the treaty commercial fishery and state regulation of the entire steelhead run on the Puyallup River because the river runs through the reservation.

Thereafter the Puyallup Tribe and others sought and obtained from the United States District Court for the District of Washington at Tacoma an order enjoining the state of Washington from excluding the hatchery steelhead on the Puyallup River from the treaty commercial fishery(App A).The federal court announced that it would retry the same issue that had been tried for ten days before the Washington Superior Court and affirmed by the Washington Supreme Court

in this case! Northwest Steelheaders and Gary Ellis are parties in this case but were denied intervenor status in the federal court case.

When the Puyallup Tribe filed its petition for certiorari in this case they did not seek review of the exclusion of the hatchery steelhead from the treaty fishery since they had obtained an injunction on this issue from the federal court.

Northwest Steelheaders and Gary Ellis now ask this Court to review the entire decision of the Supreme Court of Washington in Puyallup III, not just the one aspect singled out by petitioners. In addition to the Reasons for Granting the Writ discussed below, this response is filed because of the

failure of the Puyallup Tribe to include the hatchery fish issue in their petition for certiorari. It is further filed because the decision of the Supreme Court of Washington in this case has now been effectively reversed by the United States District Court for the Western District of Washington at Tacoma in a proceeding in which we were not allowed to intervene.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTORY

This is not a civil rights case. We are not here faced with the equal protection of the laws problem implicit in every civil rights case. Rather we are concerned with defining the special protection afforded by the treaties.

This is a conservation case. We are dealing with the protection of a diminishing resource of immense value. We respectfully urge this Court to consider the counter-

petition for certiorari with this in mind.

The management of the anadromous fishery of the state of Washington is now in chaos as a result of conflicting decisions of state and federal courts. United States District Court Judge George Boldt has issued an injunction against the state of Washington carrying out the decision of the Supreme Court of Washington in this case! He has issued injunctions requiring the state of Washington to disobey state court injunctions dealing with the allocation of the non-treaty Indian share! Judge Boldt has enjoined the state of Washington from obeying the International Salmon Treaty between the United States and Canada!

The issues that separate the state and federal courts involve the proper interpretation of the decision of this Court in Puyallup I and Puyallup II. They are the

four questions presented in this counter-petition for certiorari: (1) the role of the state in management of the resource; (2) the exclusion of the hatchery fish from the treaty fishery; (3) the allocation of fish among user groups; and (4) the proper definition of conservation in fish management.

This case returned to the courts of Washington upon remand from the decision of this Court in Puyallup II. By accepting certiorari in this case this Court can determine whether its instructions were carried out correctly. This will necessarily resolve the state and federal differences that now exist.

II. THE DECISION OF THE SUPREME COURT OF WASHINGTON IN THIS CASE IS IN DIRECT CONFLICT WITH THE DECISIONS OF JUDGE BOLDT AS AFFIRMED BY THE NINTH CIRCUIT IN UNITED STATES v. WASHINGTON, 384 F Supp 312 (WD Wash, 1974); aff'd 520 F 2d 677 (9th Cir 1975); cert den 96 S Ct 877.

The decision of the Supreme Court of Washington had not yet been rendered at the time that this Court denied certiorari in United States v. Washington, so the conflict between the highest court of the state and the highest court of the circuit did not then exist. It does now.

The differences between the state and federal courts, as well as a comparison with the holdings of this Court in Puyallup I and Puyallup II and the actual effect of the conflict, can best be shown by the chart that appears in Footnote 1.

III. THE CONFLICT BETWEEN THE DECISION OF THE WASHINGTON SUPREME COURT IN THIS CASE AND THE DECISION OF JUDGE BOLDT AS AFFIRMED BY THE NINTH CIRCUIT IN UNITED STATES v. WASHINGTON IS JEOPARDIZING THE CONSERVATION OF THE RESOURCE WHICH IS NECESSARY FOR ALL.

Judge Cochran in the first trial in this case (Finding XV) and Judge Brown in the second trial in this case (Conclusion IX) have held that state regulation of

Puyallup Tribe fishing is necessary for conservation.

Here are some of the facts in this record which support the finding:

(A Ramona Bennett the chairperson of the Tribe testified:

(1) The Tribe has no enforcement officers (Tr 78).

(2) The Tribe has no direct reporting of the Indian catch; the only reporting is from the commercial fish buyers (Tr 784, 811).

(3) The Tribe does not know what the average catch is (Tr 798).

(4) The Tribe does not know how many fish escape to spawn (Tr 822).

(5) The only evidence of overfishing used by the Tribe is poor catches as reported by its fishermen (Tr 767).

(6) 1971 tribal fishing regulations were still in effect at the time of trial (May and June 1974) (Tr 777).

(7) The Tribe has waived its regulations when requested by its fishermen (Tr 781).

(8) Every requested Indian fishery has been recognized and approved by the Tribe (Tr 782).

(9) The Indian fishermen themselves report violations (Tr 781).

(10) The Tribe wants to increase its steelhead catch 1,000 each year though they have no studies of future run sizes (Tr 788-790).

(11) The Tribe did continue fishing past the January 17, 1974 closing date set by the Department of Game for fishing by this Tribe (Tr 787).

(B) Hank Adams, the fisheries management coordinator of the Tribe testified:

(1) He has no courses in fishing management (Tr 926).

(2) His future plans do not specifically

include direct reporting of fish catches by Tribal fishermen (Tr 903).

(3) He says the Tribal fishermen "would not necessarily" disregard the escapement and sports catch in determining the amount of their harvest (Tr 920).

(4) He says that the 1971 Tribal regulations require an official list of fishermen with a registration card, but he has not made up that list because new regulations will be made up (Tr 924).

(5) The list of Tribal fishermen furnished by the witness Adams included some names typed in April or May, 1974, and some added in ink during the noon hour recess in his testimony at trial (Ex 74-29; Tr 934).

(C) James Heckman of the U.S. Fish and Wildlife Service testified:

(1) In 1971 the State Department of Fisheries and his federal agency both recommended that the Tribe reduce the

chinook salmon season by two days each week in the interest of conservation and the Tribe only reduced it by one day (Tr 1030, 1031).

(2) In 1973, the State Department of Fisheries recommended a reduction in chinook salmon fishing in the interest of conservation and the Tribe refused (Tr 1034).

The pattern that emerges is that the commercial tribal fishermen really do what they want to do without any independent control by the Tribe. But self regulation by any commercial group is not adequate to protect a fragile resource.

Even if the Puyallup Tribe had adequate regulation in the interest of conservation (which they do not on this record) the threat of multiple management of the same resource remains. This is eloquently discussed by this Court in the treaty fishing case, Kennedy v. Becker, 241 US 556,

36 S Ct 705, 60 L Ed 1166 (1916), where the Court rejected dual control of the resource by a Tribe and the state, saying:

> "Such a duality of sovereignty, instead of maintaining in each the essential power of preservation, would in fact deny it to both."

There must be one independent state agency, the Department of Game, with the authority to regulate all steelhead fishing on the Puyallup River.

Fisheries management is a very important science at the University of Washington and 106 schools through the country. ROYCE, INTRODUCTION TO THE FISHERY SCIENCES, Preface I, X (1972). Regulatory decisions must be made by experts exercising great care. A mistaken prediction of escapement needs may show no effect at the time, but result in extinguishing an entire run after two or three life cycles have been completed. CRUTCHFIELD AND PONTECORVO, THE PACIFIC

SALMON FISHERIES, A STUDY OF IRRATIONAL CONSERVATION, 167. For example, starting in 1880 in Southern California mistaken estimates of escapement needs and overfishing by commercial fishermen virtually eliminated salmon in that area of the state. NETBOY, THE SALMON, THEIR FIGHT FOR SURVIVAL (1974). Run size can change dramatically from year to year as can the amount of water in the river. Conservation requires that certain techniques of harvesting fish be avoided regardless of the numbers.

James Heckman, the expert witness for the Puyallup Tribe in this case also stressed that conservation includes maintenance of the habitat of the specie, which requires adequate water supply, egg incubation areas, food and shelter (Tr 677, 678).

Though predictions can be made ahead of time, a run cannot be accurately estimated

until it is about to enter a river and then management decisions have to be made quickly. The Department of Game with a total staff of 468, including many trained biologists, can provide the required expertness. (Annual Report of Department of Game, July 1, 1972 - June 30, 1973).

Good conservation management requires wise use of the resource to the benefit of all of the users now and in the future.

When the federal courts limit the definition of conservation to adequate escapement they are holding that the following conservation needs are beyond the regulatory power of the state of Washington:

1. Regulating mesh size in salmon fishing which can prevent an incidental catch of the steelhead which are smaller.

2. Regulating the timing of a fishing season which can prevent the

depletion of already threatened wild native stock, since they may enter a river at slightly different times than hatchery fish.

3. Preventing underfishing which can damage a run by increasing the competition among the fish for spawning areas.

4. Preventing certain techniques of harvesting fish, such as dynamite charges which cause waste, and the fish wheel, which has the potential of totally eliminating a run on a particular river.

5. Requiring the removal of nets from the water periodically, so that fish will not be wasted.

6. Varying fishing opportunities in different years, since on some runs all fish should escape for spawning, while on other rivers the run is so large that 85% or more can be safely harvested.

7. Preventing all fishing at the

mouth of hatcheries when this would deplete the returning run necessary for the continuation of the hatchery program. VAN CLEVE AND JOHNSON, MANAGEMENT OF THE HIGH SEAS FISHERIES OF THE NORTHEASTERN PACIFIC, 17 (1963); ROBINSON AND ROLLINS, MANAGING AQUATIC RESOURCES, OUR CHANGING FISHERIES 136 (1971).

The federal court decisions in U.S. v. Washington allow management by a non-expert (a federal judge) or by multiple user groups (the self-regulating tribes). What is needed is expert, unified, independent management by the state of Washington respecting all treaty rights as defined by this Court. The present bad fish management due to the federal decisions cannot be good law.

IV. THE CONFLICT BETWEEN THE DECISION OF THE WASHINGTON SUPREME COURT IN THIS CASE AND THE DECISION OF JUDGE BOLDT AS AFFIRMED BY THE NINTH CIRCUIT IN U.S. v. WASHINGTON IS UNDERMINING THE RIGHTS OF THE STATE, AS GUARANTEED BY THE TENTH AMENDMENT.

The United States Constitution provides in the Tenth Amendment that:

> "Powers reserved to states or people. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The state of Washington entered the Union in 1889 with every right of the thirteen original states.

Puyallup I as later approved by Puyallup II, states:

> "The overriding police power of the State expressed in non-discriminatory measures for conserving fish resources, is preserved." (391 US 392 at 398-399 (1968))

Similar decisions were made by this Court in 1876, 1891, 1896, 1905, 1916, 1924, 1942, and 1962. McCready v. Virginia, 94

US (4 Otto) 391, 24 L Ed 248, (1876); Manchester v.Massachusetts, 139 US 240, 11 S Ct 559, 35 L Ed 159 (1891); Ward v. Race Horse, 163 US 504, 16 S Ct 1076, 41 L Ed 244 (1896); U.S. v. Winans, 198 US 371, 25 S Ct 662, 49 L Ed 1089 (1905); Kennedy v. Becker, 241 US 556, 36 S Ct 705, 60 L Ed 1166 (1916); Lacoste v. Dept. of Conservation, 263 US 545, 44 S Ct 186, 68 L Ed 437 (1924); Tulee v. Washington,315 US 681, 62 S Ct 862, 86 L Ed 1115 (1942); Organized Village of Kake v. Egan, 369 US 60, 82 S Ct 680, 7 L Ed 2d 573 (1962).

Contrary to these ten decisions of this Court, the Ninth Circuit held that the state of Washington cannot in perpetuity regulate treaty fishing even when limited to "the interest of conservation" without the "ADVANCE JUDICIAL SCRUTINY" of the District Court. The Tenth Amendment reservation of the sovereign power of Washington

becomes a recommending function. As to certain "self-regulating" tribes, the Ninth Circuit goes further and says that their fishing may be regulated by no one.

The Puyallup cases require that state "regulation meets appropriate standards and does not discriminate against the Indians." (391 US 392 at 398) The District Court and Ninth Circuit in U.S. v. Washington did not define appropriate standards for state regulation as mandated by this Court. Instead, they took away the right of Washington to manage its salmon and steelhead resource.

In the case of Milliken v. Bradley, 418 US 717, 94 S Ct 3112, 41 L Ed 2d 1069 (1974), this Court struck down a school desegregation plan which would have required perpetual regulation by the District Court. This Court there stresses:

> "But it is obvious from the scope of the inter-district remedy itself that absent a complete restructuring of the laws of Michigan relating to school districts the District Court will become first, a de facto 'legislative authority' to resolve these complex questions, and then the 'school superintendent' for the entire area. This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives." (418 US 717, at 743, 744)

The dissent of Mr. Justice Marshall in Milliken v. Bradley agrees that the District Court should not become a school superintendent, and argues that such usurpation of power will not occur on the facts of that case. The dissent states:

> "Our cases, of course, make clear that the initial responsibility for devising an adequate desegregation plan belongs with school authorities, not with the District Court. The court's primary role is to review the adequacy of the school authorities' efforts and to substitute its own plan only if and to the extent they default." (418 US 717, at 810)

****

"Furthermore, there is no basis whatever for assuming that the District Court will inevitably be forced to assume the role of legislature or school superintendent. Were we to hold that it was its constitutional duty to do so, there is every indication that the State of Michigan would fulfill its obligation and develop a plan which is workable, administrable, financially sound and, most important, in the best interest of quality education for all of the children in the Detroit metropolitan area."
(418 US 717, at 810, 811)

The Ninth Circuit's ratification of a perpetual fishmaster for western Washington is thus contrary to both the majority and dissenting opinions in the Milliken v. Bradley case. It does not give the state of Washington the opportunity of developing a proper plan for protecting Indian treaty rights as defined by this Court.

The basic thrust of the Ninth Circuit decision is that the state of Washington cannot be trusted to protect Indian treaty rights. The suggested solution is to turn

over management of the anadromous fishery to the federal government. The decision of the Supreme Court of Washington in our case is directly contrary to the Ninth Circuit.

V. THE QUESTION FOR CERTIORARI PRESENTED BY THE PUYALLUP TRIBE OF THE RIGHT OF THE STATE TO MANAGE THE ENTIRE PUYALLUP RIVER INCLUDING THE RESERVATION FISHERY,CAN ONLY BE MEANINGFULLY REVIEWED BY THIS COURT IN THE CONTEXT OF THE COMPLETE DECISION OF THE WASHINGTON SUPREME COURT AND THE CONFLICT BETWEEN THE STATE AND FEDERAL DECISIONS.

The Puyallup reservation was reinstated in 1974 by the Ninth Circuit in a case in which Northwest Steelheaders and Gary Ellis were not parties, U.S.v. Washington, supra. It is not geographically defined by that court but probably includes the first seven miles of private land in the city of Tacoma bordering the Puyallup River.

The Ninth Circuit opinion in the later U.S. v. Washington case says that no

one can regulate an Indian reservation or the tribal fish catch on the reservation. Since the Puyallup reservation is at the mouth of the river, this means that the tribal fishermen could take all of the steelhead. The Puyallup petition for certiorari justifies this result by citing cases giving tribes exclusive control over reservation activities such as adoptions. See for example, Fisher v. District Court, 424 US 382, 96 S Ct 943, 47 L Ed 2d 106, reh den 96 S Ct 1524 (1976).

The concurring opinion below of Chief Justice Stafford after discussing such cases, distinguishes them in this way:

> "On the other hand, it is only logical to assume the Supreme Court is equally aware of the above cited cases and had them in mind when the following broad language was used in Puyallup II at page 49:
>
> > The aim is to accommodate the rights of Indians under the Treaty and the right of other people.

> > We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets. (Italics mine.)
>
> "When one considers the fragile nature of the fishery involved, as well as the State's physical and financial support of that resource, it is easy to understand the above quoted language. If the Supreme Court has not recognized the existence of a State power to control and supervise the mandated allocation, the Supreme Court's direction would, for all practical purposes, be impossible to establish, implement, and enforce. Without question the Supreme Court did not intend to direct the State of Washington to perform a useless act." (Department of Game v. Puyallup Tribe, Inc., 548 P 2d 1058 at 1075)

The concurring opinion of Justice Rosellini also adds that if there was any intention in the treaty with the Puyallups of giving them exclusive control over the reservation fishery this could have been stated. He points out that:

> "A treaty signed in June 1855 in Walla-Walla Valley between the United States and the Walla-Walla Tribe, 12 Stat. 945, 946, illustrates that the Indians and United States were capable of using explicit language when it was desired to give exclusive rights to Indians to fish. Article 1 of the treaty says
>
> [t]hat the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians, and at all other usual and accustomed stations in common with citizens of the United States, and of erecting suitable buildings for curing the same; the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens, is also secured to them.

> "It can be seen that in the Walla-Walla Treaty, the Indians reserved the exclusive right to take fish from streams running through and bordering said reservation and outside their reservation in common with the citizens of the United States. There was no difficulty in selecting the words to convey the separate ideas of "exclusive rights" and "rights secured in common" with the citizens of the United States." (548 P2d 1058 at 1076-77)

In U.S. v. Washington, District Court Judge Boldt first said that the reservation fishery could not be regulated, but then changed his mind one year later and said on February 26, 1975:

> "The Court has concluded that determination of the on-reservation and off-reservation shares of the catch should be based on historical data to the extent available." (Memorandum Decision and Order Re Nisqually River Chum Salmon and Steelhead Fisheries)

Can a user group, such as sports fishermen, create a treasured recreational resource with their own money without having that treasure taken away by others? If the hatchery fish spent their entire life in

wholly owned ponds, it is unquestioned that no one else could legally deplete the supply. Murphy v.Hitchcock, 22 Hawaii 665 (1915); Camp Clearwater, Inc. v Plock, 52 NJ Super 583, 146 A 2d 527 (1958), aff'd 157 A 2d 15 (1959), Annot. 57 ALR 2d 569, 587. There is no reason why the right to these artificially propogated hatchery plants cannot be maintained when they are released in a public river. An analogy might be found in grazing law. The ownership of cattle remains in its owner no matter which land is used by the cattle for grazing. Fick v. Parman, 71 Nev 201, 284 P 2d 380 (1955); Stewart v. Hunter, 16 Or 62, 16 P 876 (1888).

There are other areas of law where a landowner may not own what crosses his land. The water in an artificial ditch is the personal property of the ditch builder and the landowners around the

ditch have no riparian water rights and must give it safe passage through their land. Methow Cattle Co. v. Williams, 64 Wash 457, 117 P 239 (1911); Madison v. McNeal, 171 Wash 669, 19 P 2d 97 (1933).

The steelhead spawn upstream in the Puyallup River system, go downstream through the reinstated reservation and out to the ocean where they spend most of their life. They then return to the river and swim upstream to spawn near their point of origin. The question presented by the Puyallup Tribe of the extent to which tribal nets can block that passage cannot be considered in isolation. If the state has the responsibility of managing the resource it must manage the entire fishery, not just a portion. If hatchery steelhead are not the property of the treaty Indians they must be

allowed to pass through the reservation uncaught. Whether the words "in common with all citizens of the territory" means a fair opportunity or a specific allocation, in either case fish caught within the reservation need to be included. And the need to conserve the steelhead resource involves control of the method and timing of fishing on the entire river.

CONCLUSION

The majority opinion of the Washington Supreme Court in this case holds a major portion of its ruling in abeyance, pending review by this Court.

In an even more recent decision, the Washington court almost pleads with this Court to review this case. In Washington State Commercial Passenger Fishing Vessel Association v. Tollefson, 87 Wash 2d 417, 553 P 2d 113 (August, 1976),

the court says:

> "Another question not considered in the briefs arises from the fact that this court has itself interpreted one of the treaties in question and has arrived at a conclusion as to its meaning which differs from that of the federal court. Department of Game v. Puyallup Tribe, Inc., 86 Wn2d 664, 548 P2d 1058 (1976). To which of these interpretations must the state agency respond? The resolution of this question cannot come from this court or from the federal district court, if no definitive authority upon the subject exists. It must come from a higher court whose decisions are binding upon both of us. In short, this dilemma can be resolved only by the Supreme Court of the United States, which, we understand, has been asked to take jurisdiction of the cases involved and settle the question." (87 Wn 2d 417, at 421)

This Court should take jurisdiction and settle the question.

Respectfully submitted,

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Federal Court Injunction (8/13/76)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al, Plaintiffs, vs. STATE OF WASHINGTON, et al, Defendants	CIVIL NO. 9213 ORDER GRANTING PRELIMINARY INJUNCTION

Dr. Whitney, Technical Advisor to the Court, advises that it is highly desirable for all concerned that the Court's decision on the Motion for a Preliminary Injunction be determined prior to August 15, 1976.

The Court has fully considered all of the issues, contentions and Proposed Findings of Fact and Conclusions of Law submitted by the parties pertaining to the so-called "hatchery issues."

Typing of the Findings of Fact, Conclusions of Law and rulings of the Court on all issues is in progress and will be completed, filed for entry with the Clerk and distributed to counsel for all parties, Monday, 8/16/76.

For the reason above stated, the Court hereby holds, finds and orders that the Temporary Restraining Order,entered 7/14/76 and by agreement of all parties continued in effect until further order of the court, be hereby replaced by a Preliminary Injunction providing as follows:

Federal Court Injunction (8/13/76)

The Defendant State of Washington, including its Directors of Fisheries and Game, and all other officers, employees, agents and attorneys of each are restrained and enjoined from basing the determination of numbers of harvestable fish which Treaty Indians shall have the opportunity to take pursuant to this Court's previous decisions, on anything other than the total estimated runs of free-swimming fish, including those resulting from hatchery or other artificial propagation or transplanting programs. This order applies to the entire case area, each of the tribes, and all of the waters within the case area.

This injunction shall continue in effect until further order of the Court after entry of final determination in Phase II.

IT IS SO ORDERED this 13th day of August, 1976.

/s/ George H. Boldt
GEORGE H. BOLDT
SR. UNITED STATES
DISTRICT JUDGE

Complaint in Intervention

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,	No. 158069
Plaintiff,	COMPLAINT OF INTERVENOR-PLAINTIFFS NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED AND GARY ELLIS
NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED and GARY ELLIS,	
Intervenor-Plaintiffs,	
v.	
PUYALLUP TRIBE, INC., et al,	
Defendants.	

Intervenor-Plaintiffs allege:

I

Trout Unlimited is a nationwide non-profit corporation incorporated in Michigan and authorized to do business in the State of Washington with over 18,000 members throughout the United States and has as one of its primary purposes, the conservation of fish.

II

Northwest Steelheaders Council of Trout Unlimited is the regional council of Trout Unlimited in the Pacific Northwest and has

over 5,000 members in the Pacific Northwest, including about 3,000 members in the State of Washington of whom about 500 live in Pierce County, Washington. Chapters are located in Tacoma and Puyallup in Pierce County and other chapters are located in Bellevue, Bremerton, Seattle, Everett, Aberdeen, Spokane, Chehalis, Hazel Dell, Longview Kelso, Sunnyside, North Seattle, Bothell, Olympia, Port Angeles, Mt. Vernon, Lynnwood, Federal Way, Renton, Wenatchee, Vancouver, Camas-Washougal and Yakima.

III

Most of the members of the Tacoma and Puyallup chapters are licensed sports fishermen in the State of Washington, have paid $2.00 each for punch cards entitling them to fish for steelhead trout in the State of Washington, and do regularly fish for steelhead trout in Commencement Bay and the Puyallup River and its tributaries (all referred to herein as the Puyallup River system in Pierce County, Washington.)

IV

Steelhead trout is a game fish under the laws of the State of Washington.

V

Gary Ellis is a citizen of the State of Washington, a resident of the City of Tacoma in Pierce County, Washington, over the age of 21 years, and the Washington State president of the Northwest Steelheaders Council of Trout Unlimited. He is a steel-

head fisherman, holds a valid current license from the State of Washington permitting him to engage in this activity, and customarily fishes for steelhead trout in the Puyallup River system.

VI

Approximately 12,000 to 14,000 steelhead trout are caught by licensed sports fishermen in the Puyallup River system each year and a significant number are caught by members of the Northwest Steelheaders Council of Trout Unlimited, especially members of the Tacoma and Puyallup chapters. Sports fishermen retain steelhead trout that they catch for their own use. If the steelhead trout caught by sports fishermen on the Puyallup River system each year were sold, the value of this fish would be about $130,000.

VII

Most of the steelhead trout in the Puyallup River system come from hatcheries. Most of the cost of the hatcheries program is financed by the license fees of sports fishermen, including the license fees of members of Northwest Steelheaders Council of Trout Unlimited.

VIII

The decision of the United States Supreme Court in this case entered November 19, 1973, provides that members of Puyallup Tribe, Inc. have a right to fish commercially for steelhead trout in the

Complaint in Intervention

Puyallup River system and the Supreme Court directs that the matter be remanded to this court to apportion the steelhead trout in the Puyallup River system between Puyallup Tribe, Inc. and the sports fishermen, to find whether the Indian treaty fishing right extends to the hatchery fish paid for by the sportsmen, and to determine a reasonable program of regulation by the Department of Game of the State of Washington consistent with the decision.

IX

Reasonable regulation of the catch of steelhead trout and the time and method of taking in the Puyallup River system by the Department of Game of the State of Washington after consultation with Puyallup Tribe, Inc. and other interested parties is necessary for the conservation of the resource.

X

Sports fishermen are entitled to those steelhead trout in the Puyallup River system originating in the hatcheries because the hatchery program is funded by sportsmen's license fees and excise taxes paid by sportsmen on fishing equipment.

XI

Puyallup Tribe, Inc. and its members are entitled to such portion of the natural run of steelhead trout in the Puyallup River system as this court should deem just and equitable.

Complaint in Intervention

WHEREFORE, Intervenor-Plaintiffs pray for a decree of this court providing as follows:

1. The Department of Game of the State of Washington after consultation with Puyallup Tribe, Inc. and other interested parties is directed to establish reasonable regulation of the catch of steelhead trout and the time and method of taking in the Puyallup River system.

2. Sports fishermen are entitled to those steelhead trout in the Puyallup River system originating in the hatcheries.

3. Puyallup Tribe, Inc. is entitled to such portion of the natural run of steelhead trout in the Puyallup River system as this court should deem just and equitable.

4. Such other relief as this court should deem just and equitable.

RIDDELL, WILLIAMS, VOORHEES, IVIE & BULLITT

By_____
Vincent R. Larson

WILLNER, BENNETT, MEYERS, RIGGS & SKARSTAD

By_____
Don S. Willner

Attorneys for Intervenor-Plaintiffs Northwest Steelheaders Council of Trout Unlimited and Gary Ellis

(April, 1974)

Questions Presented	This Court in Puyallup I	This Court in Puyallup II	9th Circuit in U. S. v. Washington	Washington Supreme Court in This Case Puyallup III	Actual Effect of Conflict upon Management of the Anadromous Fish Resource in the Western District of Washington
1. Right of the State to Manage the Resource.	"And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power . . . But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians . . . The overriding police power of the State, expressed in non discriminatory measures for conserving fish resources, is preserved." 391 U.S. 392 at 398, 399 (1968)	- - - - - - - - - -	"Therefore, the district court wisely insisted that proposed state regulations be submitted to it for approval before being enforced as to treaty Indians." 520 F.2d 676 at 687 (1975)	The state of Washington is to manage the entire steelhead resource of the Puyallup River in the interest of conservation.	On the Puyallup River at the present time the: 1. Yakima Tribe may self-regulate its own fishery; 2. Muckleshoot Tribe fishery is regulated by Judge Boldt; 3. steelhead fishery of the Puyallup Tribe is regulated by the Washington Superior Court though Judge Boldt has enjoined the Department of Game (but not the Superior Court) from excluding hatchery fish; 4. salmon fishery of the Puyallup Tribe is regulated by Judge Boldt; 5. salmon fishery of non-treaty fishermen is regulated by the State after its regulations are approved in advance by Judge Boldt; 6. steelhead fishery of non-treaty fishermen is regulated by the State (according to the Washington Supreme Court) or by Judge Boldt (according to Judge Boldt).
2. Exclusion of Hatchery Fish from the Treaty Fishery.	- - - - - - - - - -	"We know from the record and oral argument that the present run of steelhead trout is made possible by the planting of young steelhead trout called smolt and that the planting program is financed in large part by the license fees paid by the sports fishermen." Majority op., 414 U.S. 44 at 47 (1973) . . . the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen." 414 U.S. at 49	- - - - - - - - - -	"We hold therefore that the Puyallup Indians have no rights in the hatchery run of steelhead other than those enjoyed by all citizens of the state." 548 P.2d 1058 at 1072 (1976)	On the Puyallup River the Superior Court is excluding the hatchery steelhead from the treaty fishery while the state of Washington (but not the Superior Court) is under federal injunction to include the hatchery fish in the treaty fishery. But under the limited definition of conservation adopted by the federal court, the Nisqually and Puyallup tribes can place nets across the entrance and block the Washington State South Tacoma Hatchery on Chambers Creek which is the source of the hatchery steelhead for the Puyallup River.
3. The Allocation of Fish to Treaty Fishermen.	- - - - - - - - - -	"Only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species. If hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned. What formula should be employed is not for us to propose. There are many variables — the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like." 38 L. Ed.2d 254 at 258 (1973)	(a) 50% of all the salmon that reach the Puyallup River ("usual and accustomed grounds and stations") and whose escapement is not necessary to preserve the run, plus (b) all salmon caught for subsistence, plus (c) all salmon caught for ceremonial purposes, plus (d) all salmon caught with hook and line in sports fishing season, plus (e) all salmon caught as part of the regular commercial fishery (in the ocean), plus (f) all salmon caught on the reservation, plus (g) compensatory fish for all salmon originating in Washington waters which are caught in the ocean by American non-treaty commercial fishermen.	". . . the Indians share equally, i.e., in common with other citizens, the public right to fish and, in addition, are guaranteed access to certain fishing locations." Majority opinion, 548 P.2d 1058 at 1068 "Moreover, we feel constrained by the express language on the face of Puyallup II, when considered independent of Puyallup I, to defer to the statement in Puyallup II, recognizing an Indian right to a net fishery. Therefore, pending an ultimate disposition of this issue by the United States Supreme Court, we will follow Puyallup II and undertake a consideration of the allocation question expressly called for by that case." Majority opinion, 548 P.2d 1058 at 1070	Since the reservation is the first seven miles of the river, and since the federal court does not limit the manner of fishing, this means according to the Ninth Circuit that the Puyallup Tribe could put a fish trap across the river within their reservation and take *all* the fish. The concurring opinion of Justice Rosellini points out that under Judge Boldt as perpetual fishmaster, the following occurred in December, 1975: ". . . the Indians caught 2,476 fish on the Puyallup River, while 1,341 sportsmen fishing by line and hook caught only 102. In Western Washington Green River, 12,000 non-Indians caught only 50 fish, while Indian netters took 4,839. On the Skagit River, 893 sportsmen caught 89 fish while the Indians netted 2,367 fish." 548 P.2d 1058 at 1079.
4. The Definition of Conservation.	This case rejects the limitation that ". . . the particular regulation sought to be imposed is 'indispensable' to the accomplishment of the needed limitation." Instead it holds that ". . . the power of the State was to be measured by whether it was necessary for the conservation of fish." 391 U.S. 401-402, fn. 14	- - - - - - - - - -	"But the only rationale for permitting state interference with Indian fishing precludes adoption of this definition and restricts the meaning of conservation to insuring optimum spawning escapement for perpetuation of the run." 520 F.2d at 686	"Conservation means the wise use of the resource, and in the management of steelhead there must be necessary escapement for needed spawning to ensure the perpetuation of the resource. The manner of fishing must be such that it can be controlled so it does not impair or damage the necessary escapement; and, further, the manner of fishing itself must not be destructive." Concurring op., Justice Rosellini, 548 P.2d 1058 at 1079	The federal court has ruled that eleven Washington conservation statutes which apply to all other citizens of the state could not be enforced against the Puyallup Tribe or any other treaty Indian fishermen. This means, for example, that under the federal court ruling the Puyallup Tribal fishermen have the right to disobey state law and kill fish with fish wheels, poison or dynamite, so long as sufficient fish escape. The state courts are trying to enforce the good conservation practices contained in these eleven statutes.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976

No. 76-423

PUYALLUP TRIBE, INC.,
AND
RAMONA BENNETT,
Petitioners,

v.

DEPARTMENT OF GAME OF
THE STATE OF WASHINGTON,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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DEPARTMENT OF GAME OF
THE STATE OF WASHINGTON,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, Department of Game of the State of Washington, respectfully submits that the single issue presented in the petitioners' request for Writ of Certiorari cannot adequately resolve this litigation, which was commenced 13 years ago. If certiorari is granted, it should, therefore, include the issues which were addressed by the Washington

State Supreme Court in construing the Treaty of Medicine Creek (10 Stat. 1132 (1854)) and should not be confined to the limited issue asserted by Puyallup Tribe, Inc. and Ramona Bennett, petitioners.

OPINION BELOW

The opinions of the Supreme Court of the State of Washington (*Dept. of Game, et al. v. Puyallup Tribe, Inc.*,[1] 86 Wn. 2d 664, 548 P. 2d 1058 (1976)) and the trial court, the Superior Court of Pierce County, are set forth in Appendices B-E of the petitioners' Petition for a Writ of Certiorari. This court has on two prior occasions rendered decisions in this case; *Puyallup Tribe v. Dept. of Game of Washington*,[2] 391 U.S. 392 (1968), and *Dept. of Game of Washington v. Puyallup Tribe*,[3] 414 U.S. 44 (1973). The prior decisions of the Washington Supreme Court in this same case are *Dept. of Game, et al. v. Puyallup Tribe*,[4] 70 Wn. 2d 245, 422 P. 2d 254 (1967), and *Dept. of Game v. Puyallup*,[5] 80 Wn. 2d 561, 497 P. 2d 171 (1972).

JURISDICTIONAL GROUNDS

The jurisdiction of this Court is invoked pursuant to 28 USC § 1257(3).

---

[1]Hereinafter referred to as *Puyallup III*, 86 Wn. 2d 664.
[2]Hereinafter referred to as *Puyallup I*, 391 U.S. 392.
[3]Hereinafter referred to as *Puyallup II*, 414 U.S. 44.
[4]Hereinafter referred to as *Puyallup I*, 70 Wn. 2d 245.
[5]Hereinafter referred to as *Puyallup II*, 80 Wn. 2d 561.

TREATIES AND STATUTES INVOLVED

The treaties and statutes involved are set forth in Appendix A to the petitioners' Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

A. *Nature of Proceedings.*

This Court in 1973 (*Puyallup II*, 414 U.S. 44) reversed a decision of the Washington State Supreme Court (*Puyallup II*, 80 Wn. 561, 497 P. 2d 171) as it related to the steelhead fishery and remanded for further proceedings consistent with the decision of this Court. That decision set forth two issues:

(1) "If hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sport fishing so far as that particular species is concerned. What formula should be employed is not for us to propose. There are many variables— * * *" (414 U.S., *supra*, at 48.)

(2) This Court specifically reserved ruling on the issue of whether hatchery fish can be excluded from the apportionment referred to above (Chief Justice Burger and Justices White and Stewart in a concurring opinion stated that the State of Washington is not obligated to subsidize the Indian fishing with planted fish paid for by sports fishermen. *Supra*, at 49).

Pursuant to the direction of this Court, on re-

mand, the state courts have concluded that hatchery fish are not included within the total available for apportionment between treaty and nontreaty persons. The state courts have further decreed that treaty fishermen are entitled to 45% of the harvestable natural run of steelhead.

STATEMENT OF POSITION

Only this Court can resolve the conflicts arising by virtue of contradictory interpretation of *Puyallup II* (414 U.S. 44) by the Washington State Supreme Court and the United States District Court for Western Washington. A senior Judge for the United States District Court for Western Washington in other litigation involving the state has announced his intention to independently examine and decide the issues which have been decided by the Washington State Supreme Court pursuant to the remand by this Court. The same United States District Court was critical of this Court's decision in Puyallup II. See, *U.S. v. Washington*, 384 F. Supp. 312, at 334-339 (W.D. Wash. 1974) (aff'd 520 F. 2d 676 (9th Cir. 1975) cert. den. 96 S. Ct. 877 (1976)).

The State Supreme Court has specifically stated that the ultimate disposition is vested with this Court, (B-32,[1] *Puyallup III*, 86 Wn. 2d 664, 681) and further stated:

> "The first phase of our opinion is held in abeyance pending a final disposition of the treaty interpretation issue by the United States Supreme Court, at which time a reversal of the trial court decision, consistent with the first phase of this opinion, may be necessary." (*Supra*, at 688, B-44)

[1]Citations in this form refer to the petitioners' Appendix.

The parties, the Washington State Supreme Court, and the public are looking to this Court for a judicial declaration which will resolve the issues presented by this case. It is only this Court which can ultimately resolve the differences which are occurring in our dual court system (state and federal) respecting these issues.

The importance of this case is reflected by the number of Indian treaties[1] within the State of Washington which are virtually identical[2] with the Treaty of Medicine Creek, *supra*, and thus the interpretation of this treaty by this Court has an impact beyond the scope of the Puyallup River.

HISTORY OF THE PROCEEDING

In 1963 the Washington State Game Department and the Department of Fisheries commenced this action, requesting a declaratory judgment seeking to determine what rights, privileges or immunities individuals who purported to be members of the Puyallup tribe possessed with reference to the exercise of the state's laws regulating fishing in the Puyallup River and adjacent waters. The pertinent

[1]Treaty of Point Elliott, 12 Stat. 927 (1855); Treaty with the Makah, 12 Stat. 939 (1855); Treaty with the Quinaielt 12 Stat. 971 (1855).

[2]The following treaties have some notable differences in language: Treaty with Yakimas, 12 Stat. 951 (1855); Treaty with Walla Wallas, 12 Stat. 945 (1855).

provision of the Treaty of Medicine Creek (December 26, 1854), (10 Stat. 1132) is Article III, which provides:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however*, That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter."

In August, 1965, the trial court concluded that neither the Puyallup Tribe, nor a Puyallup Reservation, existed and thus there were no treaty rights for individuals who were members of the Puyallup organization. The State Supreme Court decided in *Puyallup I*, 70 Wn. 2d 245 (1967), that the trial court lacked jurisdiction to consider whether the tribe existed. The Court concluded that although the Puyallup Reservation no longer existed, the Puyallup Indians have a treaty right to fish at usual and accustomed grounds. Those rights were not absolute but were subject to the state's exercise of police power provided the state's regulations were reasonable and necessary for conservation. The court further concluded that the state had sustained its burden in establishing that the continued use of set and drift nets would result in the nearly complete destruction of fish runs in the Puyallup River. (*Supra*, at 261)

This Court took jurisdiction in *Puyallup I*, 391 U.S. 392 (1968), and concluded that the Indian treaty fishing rights are subject to the state's exercise of its police power, noting, *supra*, at 398, that the manner of fishing, the size of the take, the restriction of commercial fishing and the like may be regulated by the state in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians. This Court indicated the standard for exercising state power with respect to Indian treaty fishing rights was whether the regulations were reasonable and necessary for conservation. The proceeding was remanded to make ultimate findings on the conservation issue with the further direction that those findings should also cover the issue of equal protection implicit in the phrase "in common with." (*Puyallup I, supra*, at 403)

The remand proceeding, commonly referred to as *Puyallup II*, commenced before Pierce County Superior Court in August, 1970. In the remand proceeding, the Department of Fisheries and the Department of Game took different legal positions. The Department of Fisheries construed this Court's decision in *Puyallup I*, 391 U.S. 401, to mean that the Indians had a greater right to participate in the off-reservation fishery than other citizens of the state. Consistent with that position, the Department of Fisheries established special fishing periods for Indians and imposed some restrictions on the commer-

cial fishery by non-Indians in Puget Sound to permit a greater number of fish to reach the areas where the Puyallup Indians engage in their fishing activities. In contrast, the Department of Game construed the same language by this Court, placing weight on the reference to "equal protection implicit in the phrase 'in common with' " (*supra* at 403) and equated this with the Fourteenth Amendment to the United States Constitution. The Department of Game's position, therefore, was that the Puyallup Indian treaty fishing rights were no greater than those of non-Indians and, accordingly, did not permit any commercialization of steelhead by the Indian fishery, since steelhead under state law since 1933 have not been permitted to be sold as a commercial fish, nor caught by other than a hook-and-line fishery.

The state superior court concluded that the state had a responsibility to recognize Indian fishing rights as superior to those of the other state citizens. The regulations adopted by the Department of Fisheries were upheld as being reasonable and necessary for conservation. All parties in that proceeding sought review by the State Supreme Court.

In *Puyallup II*, 80 Wn. 2d 561 (1972), the State Supreme Court essentially affirmed the position of the Department of Fisheries. But the court rejected the Department of Game's contention that Indians' fishing rights are not superior to other citizens. However, upon an examination of the record, it concluded there was justification for the complete prohibition

of any net fishery for steelhead in the Puyallup River for the year 1970. The Court concluded that the Department of Game would be obligated to annually review the steelhead runs on the Puyallup River and, if there was a surplus of fish over that necessary for escapement and the hook-and-line sports fishery, then a net fishery for Indians must be permitted.

The Department of Game sought and this Court granted review of steelhead fishing on the Puyallup River. No party sought to review the state court decision involving the Department of Fisheries. It should be noted and emphasized that the Department of Fisheries' regulations did not apportion any specific percentage or quota of fish to the Indian fishery.

Justice Douglas, writing on behalf of this Court in *Puyallup II*, 414 U.S. 44 (1973), reasserted the proposition that Indian off-reservation fishing rights are subject to state regulation but those regulations must be reasonable and necessary for conservation and not discriminatory. The court concluded there was discrimination because an Indian net fishery was barred and only a hook-and-line fishery, entirely preempted by non-Indians, was allowed. The discrimination resulted from permitting the entire sports fishery to be considered before the Department of Game would be required to permit any Indian net fishery for surplus fish. We note there was nothing in the record to support the conclusion that the Indians were excluded from the sports fishery.

The record made in this remand proceeding clearly establishes that Indians are permitted, and do[9] participate in the hook-and-line fishery on the same basis as all other citizens with the further provision that they are not required to obtain a state license in their ceded areas. (F.F. IV, D-9)

The majority opinion specifically reserved ruling on the question of whether hatchery planted steelhead are subject to Indian treaty fishing rights, or whether such fish can be excluded from a special Indian fishery. Three judges, in a concurring opinion, Justices White, Stewart and Chief Justice Burger, concluded that hatchery-planted steelhead are not subject to the Indian treaty fishery. This Court did not establish a formula or quota for determining the steelhead harvest by Indian fishermen stating:

> Only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species. If hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned. What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like. The aim is to accommodate the rights of Indians under the Treaty and the rights of other people. (*Puyallup II*, 414 U.S. at 48-49.)

This Court's decision was announced November 19, 1973. The Department of Game promptly on November 29, 1973, adopted regulations specifically permitting a net fisheries by Indians for steelhead. (F.F. XX, D-18)

STATEMENT OF THE CASE ON THE REMAND PROCEEDING

Steelhead, an anadromous fish, are naturally spawned in fresh water streams and rivers and normally after two years in the fresh water environment migrate to salt water for a two-year period. (F.F. V, D-10) A majority of the returning steelhead, after two years in salt water, return to the fresh watershed from which they originated and spawn to propagate the next generation. Approximately 5% of those steelhead survive the spawning activity and again migrate to salt water.

The state of Washington has classified steelhead as a game fish (RCW 77.08.020) since 1933, and its citizens are not permitted to commercialize or fish for steelhead by other than a hook-and-line fishery (RCW 77.16.040).[10] The state requires its citizens

[9]Testimony by Ramona Bennett, chairperson, Puyallup Tribal Council, that tribal members participate in the sport fishery.

[10]The commercial fisheries in the Columbia River for various salmon species do catch, on an incidental basis, steelhead.

to acquire a fishing license ($7.50) and a $2.00 annual steelhead punchcard to engage in the fishery for steelhead. (See, RCW 77.32.010 and 77.12.031) (F.F. IV; D-9) There are exceptions provided from the payment of license fees to those who are under the age of sixteen, over the age of seventy who have been residents of the state for ten years, certain disabled veterans and treaty Indians fishing within their ceded areas. See, RCW 77.32.010, 77.12.230; *Tulee v. Washington*, 315 U.S. 681 (1942). The license fees which are charged the citizens of the state are placed in the state game fund (RCW 77.12.170) and cannot be used for any purpose other than "the protection, propagation and restoration of wildlife and game and the expenses of administration of the department." (F.F. IV; D-9)

The steelhead resource in Western Washington is relatively small in size compared with the various species of salmon. For example, in 1971 the steelhead catch represented 3.3% of the total steelhead and salmon catch, the respective numbers being 246,000 steelhead and 7,777,000 salmon. Steelhead fishing occurs in 170 to 180 rivers and streams of the state of Washington. Expert witnesses testifying in this remand proceeding both on behalf of the plaintiffs and defendants agreed that so long as there is only a hook-and-line fishery as contrasted with a net fishery for steelhead, there is no need for comprehensive records and data on the steelhead resource. The reason is that the inefficiency of the hook-and-line fishery

is such that a reasonable escapement of steelhead will occur for spawning purposes, resulting in a reproduction of the following generations of steelhead. (F.F. VII; D-11) The introduction of a net fishery for steelhead and the management of the same will require the development of more comprehensive information and data than has been compiled in the past. Mr. Heckman, biologist for the defendants, indicated it will probably take three to five years and the expenditure of hundreds of thousands of dollars to develop sufficient data and information to accurately predict in advance run sizes of steelhead to the various watersheds, which is a necessary element in the effective management of a net fishery.

The Department of Game has been engaged for a number of years in a substantial hatchery program to enhance the production of steelhead in the state of Washington. (F.F. IX, D-12) The hatchery program utilizes eggs taken from steelhead, the eggs are hatched and the fish are reared in hatcheries and rearing ponds in various locations in the state of Washington. The state provides food for these hatchery steelhead and normally at the end of one year hatchery steelhead have reached what is referred to as smolt size and are ready to commence migration to salt water. Such smolt are normally approximately 6 to 8 inches in length. (F.F. IX; D-12) In the natural habitat it normally takes two years for steelhead to reach smolt stage. The consistency of water temperature and availability of food shortens this

period to one year in the hatchery program. The hatchery smolts are placed in the watershed at various locations at a time when they are ready to migrate to salt water, normally occurring between April 15th and May 15th on the Puyallup River. This planting program coincides with the natural outward migration of native steelhead smolt and the hatchery planted smolts spend very little time in the fresh watershed.

The Department of Game's hatchery program involves some eighteen hatcheries and nine rearing ponds, with a capital replacement value of $33,652,-241. (F.F. IX, D-12) The annual operational costs of the department for the total steelhead program, fiscal year July 1, 1972 through June 30, 1973, were $1,636,247. (F.F. IX, D-12) The sources of revenue for these expenditures consist of license fees imposed upon citizens of the state as user fees (67%), federal financing of various programs (4%), and from mitigation funds (29%). The total hatchery program of the Department of Game has an annual capacity of approximately 5,000,000 smolts, with nearly 3,000,000 of these being winter-run steelhead.

The Department of Game started planting hatchery steelhead in the Puyallup River in 1933, the year the department was created. (F.F. X, D-12) The planting of hatchery steelhead in the Puyallup River became a substantial and regularly followed program commencing in 1948 to the present time.

All of the hatchery steelhead planted in the Puyallup River originate from eggs secured from the South Tacoma Hatchery located on Chambers Creek which is separate and apart from the Puyallup River. This South Tacoma Hatchery is totally financed by state funds and has a current replacement value of $2,531,795.

The direct investment in the steelhead hatchery program on the Puyallup River for the 1972-73 fiscal year was $27,991. During the year 1973, the department planted in the Puyallup River 75,000 steelhead smolts. The normal rate of return of adult steelhead from their salt water environment is approximately 10%, thus reflecting a projected return of 7,500 hatchery fish to the Puyallup River two years after their plant in 1973. (F.F. V, D-10) This reflects a direct investment by the Department of Game of $3.72 per returning adult hatchery steelhead to the Puyallup River. All of the funds used for this planting program on the Puyallup River are state funds derived from the state game fund which in turn is principally dependent upon license fees imposed on user groups." The benefits of these expenditures is reflected by the trial court finding (F.F. XI, D-14), which is strongly supported by the record, that at the present time slightly in excess of 50% of the total steelhead run in the Puyallup River consists of first generation hatchery propagated steelhead.

The recreational hook-and-line fishery for steelhead as previously noted is an inefficient fishery in

the sense of comparing effort to catch. A survey taken during the 1973-74 fishing season on the Puyallup River resulted in some 3,243 persons being actually observed engaging in the hook-and-line fishery for steelhead. At that time those individual fishermen were interviewed, and the interviews reflected that the fishermen at the time of the interview had fished some 9,059 hours (F.F. XIX, D-19). To reflect additional fishing time after the interviews and also to reflect fishermen who were not observed and not "interviewed" a formula explained in the record produced an estimate that for the 1973-74 steelhead season on the Puyallup River, consisting of 121 days, sports fishermen spent 92,514 man hours to catch an estimated 4,354 steelhead.

There are approximately 850 members of the Puyallup Tribe, of which 320 are over the age of 21. Twenty Puyallup tribal fishermen fish essentially full-time with another twenty being basically part-time fishermen and, lastly, an additional twenty who only occasionally participate in the fishery. The majority of the Indian fishery is for salmon (F.F. XV, D-16), with the catch of salmon exceeding steelhead on a ratio of approximately 10 to 1. Steelhead which are caught in the Puyallup River average six to eight pounds with a commercial value of approximately $10. While it is difficult to ascertain the In-

[11]The only exception to this statement in the last 20 years was a $3,000 grant of federal anadromous fish funds from the U.S. Fish and Wildlife Service to fund a portion of a study conducted by Mr. John Hisata of the Department of Game in 1972-73 re a creel census on the Puyallup River.

dian catch on the Puyallup River during the 1973-74 seasons, it appears to have been in the neighborhood of 2,500 to 3,000 steelhead.[12]

As previously indicated, the Department of Game promptly following this Court's decision in *Puyallup II*, 414 U.S. 44, adopted regulations specifically permitting a net fishery by Indians for steelhead in the Puyallup River. The special season under that regulation terminated on January 17, 1974, but the Puyallup Tribe continued to fish following the termination of the regulation. They testified that they did not feel nor consider themselves bound by state regulations. That position by the tribe has continued notwithstanding the decision by the state court on the remand of this proceeding. On February 27, 1976, the Pierce County Superior Court found that the tribe and the tribal officers were in contempt for failure to comply with court orders prohibiting them from encouraging or participating in a fishery for steelhead after tribal members had caught the apportionment of the steelhead run decreed by the superior court. The court did not impose any sanctions as a result of its judgment for contempt.

The record in this case shows that the tribe has no enforcement officers and depends upon its own

[12]The fish coordinator for the Puyallup Tribe testified to a range of 2,000 to 2,500. The biologist testifying on behalf of the tribe indicated an Indian reported catch of 1,800 steelhead as of January 7, 1974, and the chairwoman of the tribe reported a tribal catch of approximately 700 after January 7, 1974. The biologist testifying on behalf of the Department of Game indicated a catch of approximately 3,000 steelhead.

fishermen for determining what modifications will be made in Indian fishing regulations. The record further establishes that although the tribe depends in substantial part upon professional advice received from the United States Fish and Wildlife personnel, they have rejected suggestions made by such personnel for reduction in tribal fishing efforts.

REASONS IN SUPPORT

Summary of Argument

The Washington state courts have acted in response to the remand directions of this Court to apportion the steelhead fishery between treaty and nontreaty fishermen. In order to make that apportionment it was necessary to determine which fish were subject to the apportionment. Thus, the state courts had to resolve:

(1) Whether hatchery-planted fish were subject to the treaty right; and

(2) What portion of the steelhead run for conservation reasons could not be harvested.

Notwithstanding the resolution of these issues by the Washington State Supreme Court, a senior Judge of the United States District Court for Western Washington has indicated an intention to commence an independent evaluation of the same issues. On the basis of past rulings, a conflict appears imminent between the state and federal district courts on these issues.[13] Both the State Supreme Court and

[13]See the Response of the Intervenor Northwest Steelheaders Council of Trout Unlimited for a number of conflicts between state and federal court rulings.

the United States District Court have recognized that they are bound by and must follow decisions of this Court. In *United States v. Washington*, 384 F. Supp., *supra*, at 339, after having engaged in an extensive criticism of this court's decision in *Puyallup II*, 414 U.S. 44, the court stated:

> In the opinion of this court, judicial integrity also requires this court to hold that the tribes' contention that the state does not have legal authority to regulate the exercise of their off reservation treaty right fishing must be and hereby is denied by this court. The basis of this ruling is the indisputable and unqualified duty of every federal circuit or trial judge, despite academic or personal misgivings, to enforce and apply every principle of law as it is directly stated in a decision of the United States Supreme Court.

In a similar manner, the Washington State Supreme Court in *Puyallup III*, 86 Wn. 2d, *supra*, at 681, after reexamining *Puyallup II*, 414 U.S. 44, and disagreeing with the conclusions expressed therein:

> "For this reason, we have rendered the decision above as the first phase of our opinion. We recognize that the ultimate disposition of the treaty interpretation question is, however, vested with the United States Supreme Court. Moreover, we feel constrained by the express language on the fact of Puyallup II, when considered independently of Puyallup I, to defer to the statement in Puyallup II, recognizing an Indian right to a net fishery. Therefore pending an ultimate disposition of this issue by the United States Supreme Court, we will follow Puyallup II and

undertake a consideration of the allocation question expressly called for by that case."
Supra, at 688:
"The first phase of our opinion is held in abeyance pending the final disposition of the treaty interpretation issue by the United States Supreme Court, at which time a reversal of the trial court decision, consistent with the first phase of this opinion, may be necessary."

With the duality of the federal and state court systems, only this Court has the authority to resolve differences between the two court systems, and we respectfully request that this Court entertain jurisdiction and resolve the issues presented.

Response to Reservation Contention

The steelhead fishery occurs only in fresh water and the Indian net fishery is concentrated at the lower portion of the river. The hook-and-line fishery occurs in the same area and extends further up the river than does the net fishery. Hence, the treaty fishery has the ability to preempt the nontreaty fishery by virtue of having the first opportunity to harvest the migrating fish. The Puyallup Reservation originally consisted of approximately 18,000 acres, including nearly seven miles of the Puyallup River. The record indicates that only 22 of those 18,000 acres are held in trust status. (F.F. I, (XII), D-3) Furthermore, the original reservation area is populated primarily by non-Indian residents and a portion of the area is included within the city limits of the second largest city in the state of Washington. In *United States v. Washington*, 496 F. 2d 620 (9th

Cir. 1974), the question presented to the United States District Court was whether the Puyallup Reservation had been terminated or diminished. The District Court determined that the reservation had been terminated (which is consistent with the decision of the state trial court in Puyallup I) and therefore did not reach the issue of whether the reservation had been diminished in size. The Ninth Circuit reversed on the termination question and thus the question of diminishment has not been resolved.

The record establishes that the Puyallup Indians do fish at locations outside of the reservation, even if one assumes that the entire original reservation is intact. Since there is a fishery outside the reservation, the question must be resolved as to whether fish harvested within the reservation are to be included or excluded in the apportionment of the fish run between the treaty and nontreaty fishermen. The state courts have included such harvests, while the Ninth Circuit and the United States District Court in *U.S. v. Washington*, supra 520 F. 2d 676, 384 F. Supp. 312, excluded such harvests not only from the apportionment but from any consideration in the apportionment.

The trial court in *Puyallup III* (D-39-41) has made clear that even if a reservation exists for a seven-mile stretch of the Puyallup River the treaty cannot be construed to authorize the complete preempting of the fish run in the river, including hatch-

ery fish which are not subject to the treaty. The court emphasized the fact that these fish are migratory, destined for locations beyond the reservation and thus there must be an ability to protect those fish which are in excess of the apportionment made pursuant to the remand of this Court.

Further, as the trial court indicated, there is a need to protect for conservation purposes the migratory fish which traverse the reservation. Said protection is required, and as Justice Douglas stated for the Court in *Puyallup II*, *supra*, at 49:

> "The police power of the state is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets."

We would respectfully submit that the petitioners' contentions re the reservation issue are not well-taken and, even if resolved in their favor, would not moot this proceeding and since the other issues previously referred to must be resolved.

Reexamination of Puyallup II, 414 U.S. 44

The Washington State Supreme Court has suggested that this Court reconsider the apportionment requirement decreed in *Puyallup II*, 414 U.S. 44. The State Supreme Court extensively discussed the construction of Article III, Treaty of Medicine Creek, *supra;* i.e., the right to fish in common with citizens of the state, and concluded after considering a number of dictionary definitions, the circumstances of the treaty, common understanding of the terms, and

prior court decisions, that "in common" means "belongs to the public" and thus the treaty granted the same rights to the treaty beneficiaries as those conferred upon citizens of the United States. Indians at the time of the treaty were not citizens nor were they entitled to the constitutional protections of the United States Constitution. (B-8-31; *Puyallup II*, 86 Wn. 2d, *supra*, at 669-381) The concurring opinion of the State Supreme Court further elaborated, reaching the same conclusions predicated in part upon an equal protection for other citizens of the state. See, *Puyallup II*, *supra*, 690-96 (D-50-58) The trial court in this proceeding also extensively discussed the nature and extent of the treaty right. (C-21-30, citing authorities and expressing conclusions similar to those of the State Supreme Court.) We recognize that the Court has ruled upon this issue in *Puyallup II*, 414 U.S. 44, but the State Supreme Court has suggested that the ruling of this Court may have been predicated in part upon a conclusion made by the State Supreme Court in *Puyallup II*, 80 Wn. 2d, *supra*, at 671, which the court has now decreed to have been in error.

Further, this Court in *Puyallup II*, 414 U.S. 44, assumed that the nontreaty fishermen preempted the steelhead fishery. It is clear from the record in this proceeding, including the testimony of the Puyallup tribal chairperson, that the Puyallup tribal Indians do participate in and are not preempted from the hook-and-line steelhead fishery. We would respect-

fully submit that the suggestion of the Washington State Supreme Court that this Court reconsider its apportionment ruling be granted.

CONCLUSION

If this Court grants certiorari it should consider the issues addressed by the Washington State Supreme Court rather than the limited issue presented by the petitioners which will not adequately resolve the litigation."[1] We make this request not on the contention that the state court has erred in its conclusions, but rather that review by this Court is necessary to avoid and minimize the on-going conflicts that are occurring between rulings of the State Supreme Court and the Federal District Court for Western Washington relating to these and associated matters. The authorities cited by the State Supreme Court and superior court, reflected in their opinions found in Appendices A and B, support the

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[1] We submit that pursuant to the authority of this Court as previously enunciated in *Legerlotz v. Rogers*, 361 U.S. 808 (1959) and *Neely v. Eby Construction Co.*, 382 U.S. 914 (1965), if certiorari is granted, it should include the following issues in its consideration:

1. When the state is required to apportion, between treaty tribal members and nontreaty fishermen, the harvesting of migratory fish, can fish produced by a state hatchery program be excluded from the apportionment on the basis that there is no treaty right to hatchery fish?

2. When the state is required to apportion, between treaty and nontreaty fishermen, the harvesting of migratory fish, can it protect those fish which exceed the treaty Indian share of the apportionment from being harvested by Indians even when the fish migrate across an Indian reservation?

3. Must the state, even when it permits all persons, both treaty beneficiaries and nontreaty persons, to participate on a nondiscriminatory basis in the fishery for migratory fish, nevertheless apportion the harvestable fish between the two groups? If so, what constitutes a reasonable apportionment?

conclusions expressed therein. We have not unduly lengthened this response by including those authorities.

We submit that limiting the review to that sought by the petitioners will not adequately deal with the problem, and if review is granted, it should include those issues which are set forth in footnote 14, on page 24.

DATED this 3 day of November, 1976.

Respectfully submitted,

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I hereby certify that on this 3 day of November, 1976, three copies of the respondent's Response and Cross-Petition to Petition for Writ of Certiorari and Cross-Petition were mailed, postage paid, to:

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-423

PUYALLUP TRIBE, INC., AND RAMONA BENNETT,
Petitioners,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,
Respondent,

On Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF FOR THE PUYALLUP TRIBE AND RAMONA BENNETT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-423

PUYALLUP TRIBE, INC., AND RAMONA BENNETT,
Petitioners,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,
Respondent,

On Writ of Certiorari to the Supreme Court of the State of Washington

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BRIEF FOR THE PUYALLUP TRIBE AND RAMONA BENNETT

Opinions Below

The opinion of the Supreme Court of Washington, Appendix B of the Petition for the Writ of Certiorari, is reported in 86 Wn.2d 664, 548 P.2d 1058 (1976). The Memorandum Decision, Findings and Conclusions, and the Order and Judgment of the Superior Court for Pierce County, the Honorable William L. Brown, Jr., entered on December 23, 1974, and April 8, 1975, Appendices C through E of the Petition for the Writ of Certiorari [hereinafter Pet. Cert. App.], are unreported.

JURISDICTION

Jurisdictional Grounds

The judgment of the Supreme Court of Washington (Pet. Cert. App. B) became final, upon denial of motion for rehearing by a vote of seven to one, on June 25, 1976. (Pet. Cert. App. B-67). The petition for a Writ of Certiorari seeking review of a single question was filed September 22, 1976 and was granted November 29, 1976.[1] The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether, consistently with established principles of tribal immunity, a state court may adjudicate on-reservation treaty fishing rights of an Indian tribe and allocate the catch among tribal and non-tribal fishermen.

TREATIES AND STATUTES INVOLVED

The treaties and statutes involved are set forth in the Attachment to this brief.

STATEMENT OF THE CASE

This case arrives in this Court for the third time in its thirteen-year history. It was initiated originally by the Washington Departments of Game and Fisheries in the Superior Court for Pierce County against the tribe and certain named individuals seeking to enjoin alleged violations of state fishing laws. On certiorari here for the first time, this Court, viewing the case as one involving state power to regulate off-reservation fishing (391 U.S. at 396 n.11), ruled that a state prohibition against Indian net fishing could be sustained only as "a reasonable and necessary" conservation measure. *Puyallup Tribe* v. *Department of Game (Puyallup I)*, 391 U.S. 392, 403 (1968).

On remand, the Department of Game assumed what the trial court called an "adamant" posture that Indians had no rights other than those of non-Indian citizens. The trial court denied injunctive relief on conservation grounds, ruling that the Game Department "had failed to give any consideration to Indian Treaty fishing rights as decreed by the Supreme Court." Memorandum Opinion of Rummel, J., November 24, 1970, Pierce County Superior Court. On appeal, the Washington Supreme Court upheld as reasonable a 1970 Fisheries Department regulation allowing limited Indian net fishing for coho salmon on the Puyallup River and a 1970 Game Department regulation precluding all Indian net fishing for steelhead.[2] *Department of Game* v. *Puyallup Tribe*, 80 Wn.2d 561, 497 P.2d 171 (1972). On certiorari for a second time, this Court held that the Department of Game's 1970 total prohibition against Indian net fishing for steelhead on the Puyallup was an invalid "discrimination" because "all Indian net fishing is barred and only hook and line fishing, entirely preempted by non-Indians, is allowed." *Department of Game* v. *Puyallup Tribe (Puyallup II)*, 414 U.S. 44, 48 (1973).

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[1] Cross-petitions, seeking to raise issues pertaining to treaty entitlement to hatchery fish, were filed by respondents and were denied as untimely by the Clerk. A motion by the respondents for extension of time for filing cross-petitions was denied by Mr. Justice Rehnquist. Order of October 28, 1976.

[2] The Fisheries Department is charged with the regulation of the state's commercial fishery, principally salmon. *See* RCW 75.08.012. Steelhead trout are a game fish under the regulation of the Department of Game. *See* RCW 77.08.020.

The order of remand from this Court led to the first state recognized Indian net fishery for steelhead on the Puyallup River during the 1973-74 winter season, more than ten years after the initiation of the action, and more than five years after this Court made clear that state closures of off-reservation Indian fisheries must be justified by conservation needs.

Two federal adjudications, to which both the Department of Game and the Puyallup Tribe are parties, intervened some months before the instant case was tried for a third time in the summer of 1974. In February and March of 1974, Senior District Judge George H. Boldt of the Western District of Washington, in the exercise of his continuing jurisdiction over virtually all aspects of treaty fishing rights of more than 20 tribes in the region, entered a series of rulings affecting a wide range of issues—including tribal self-regulation, allocation of anadromous fish resources among treaty and nontreaty fishermen, and the power of the state to restrict off-reservation fishing for conservation purposes. *United States* v. *Washington,* 384 F.Supp. 312 (W.D. Wash. 1974), *aff'd,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976). Since the initial decision, Judge Boldt has exercised a continuing jurisdiction, ordering closures at various times of Indian and non-Indian fisheries, on and off reservation.[3] Congress has appropriated more than $6 million to implement the Boldt decision, a sizeable portion of which has gone to the Bureau of Indian Affairs for the purpose of strengthening the tribes' fisheries management programs. *See* House Comm.

[3] Between February 1974 and December 1976 the federal district court entered 56 orders in the exercise of its continuing jurisdiction.

on Appropriations, Department of the Interior and Related Agencies Appropriation Bill, 1976, H.R. Rep. No. 374, 94th Cong., 1st Sess. 32 (1975).

Presently pending before Judge Boldt, and referred to by the parties as Phase II of the treaty fishing litigation, are several environmental claims asserted by the tribes against the State of Washington. The claims are farreaching, involving the more than twenty tribes party to the Boldt litigation, six treaties, over fifteen rivers in the case area including several outside of Puget Sound, and all five species of anadromous fish reached by the treaties. The remedies sought include equitable relief against state action alleged to impair substantially the fish resources and fishing grounds that are subject of the treaties, and a declaration that all free-swimming fish, including those that are hatchery reared, are embraced by the treaty "right of taking fish." In an order and opinion of August 13, 1976, Judge Boldt enjoined state officials from basing any determination of numbers of harvestable fish available to treaty fishermen on anything other than total estimated runs of free-swimming fish, including hatchery fish, pending final determination of the Phase II claims. After one extension, a trial date on Phase II has been set tentatively for January 8, 1978. Discovery is proceeding consistently with normal rules governing complex litigation.

The second federal adjudication antedating the third trial of the instant case occurred in May 1974. The Court of Appeals for the Ninth Circuit entered a ruling in a separate lawsuit initiated in 1971 by the United States on behalf of the Puyallup Tribe against the state and a sports fishing group and its officers, seeking a declaration "that the Puyallup Indian Tribe

and its authorized representatives have exclusive right to, and regulation of, all fishing on or in the Puyallup River within the Puyallup Indian Reservation."[4] The complaint, reciting Department of Interior legal opinions that the bed of the Puyallup River within the original reservation boundaries was still held in trust by the United States for benefit of the tribe, *compare Choctaw Nation* v. *Oklahoma,* 397 U.S. 620 (1970), prayed for injunctive relief enjoining the state and private defendants from exercising jurisdiction over, and interfering with, Indian fishing within reservation boundaries. Before the Ninth Circuit, the state challenged "the continued existence of the Puyallup Indian Reservation and, as a consequence, the right of the Puyallup Tribe of Indians to fish, free from State interference, on the part of the Puyallup River lying within the Reservation." *United States* v. *Washington,* 496 F.2d 620, 620 (9th Cir. 1974) (per curiam). The court rejected this claim and held that the reservation "continues to exist." *Id.* at 621. Certiorari was denied. 419 U.S. 1032 (1974).

The instant case was tried for the third time in the Pierce County Superior Court in June of 1974. On January 10, 1974, in an amended pleading, the Department of Game sought a declaration that it possessed the sole authority to regulate the taking of steelhead by the Puyallup Tribe on the Puyallup River. (App. 3). The Department of Fisheries filed no pleading and did not participate in the case. Complaints in intervention filed by two sportsmen's groups, Northwest Steelheaders Council of Trout Unlimited and the Western Steelheaders, Inc., made claims that sports

[4] Complaint, Civ. No. 39-71 (W.D. Wash.).

fishermen were entitled to all hatchery steelhead in the Puyallup River by reason of contributions to the hatchery program represented by sportsmen's license fees and excise taxes (App. 7).

By answer, filed on May 23, 1974 (App. 11), by motion for continuance filed before trial, at the trial, by motion for reconsideration, and by proposed findings and conclusions (Defendants' Proposed Findings and Conclusions 24-25), the tribe asserted that the intervening decision of the Ninth Circuit confirming the existence of the Puyallup Reservation mooted the remand because of the lack of state power to regulate on-reservation fishing. By these same procedural mechanisms, the tribe continuously asserted its sovereign immunity. Undisputed testimony at trial establishes that the tribal steelhead fishery occurs almost exclusively on the river within the exterior boundaries of the reservation. (App. 79; R. 773-74). The trial court acknowledged the Ninth Circuit's ruling that the Puyallup reservation "had not been terminated and extinguished,"[5] found that the tribe's intention is to take 90 to 100 percent of all its future steelhead harvest within the reservation boundaries (FF XVIII, Pet. Cert. App. D-17), averred that "the extent of [the treaty] right within the boundary of the former Puyallup Indian Reservation is not now before this court" (CL IV, Pet. Cert. App. D-20), but then concluded that treaty rights, even when exercised on-reservation, permitted the taking of no hatchery fish whatsoever and no more than 45 percent of the harvestable natural

[5] FF XVI, Pet. Cert. App. D 16-17. In his Memorandum Decison (Pet. Cert. App. C-37), however, the trial court concluded that an earlier state court opinion that the Puyallup Reservation no longer exists was "the law of this case."

run. By the court's computation this came to an annual tribal catch of 3,310 fish[6] or perhaps 3,280 fish.[7] The trial court assumed a continuing jurisdiction to regulate the on-reservation steelhead fishery for purposes of both conservation and allocation, and ordered the tribe to file with the court an authenticated roll of authorized fishermen and weekly catch reports during the steelhead season. FF VIII, Pet. Cert. App. D-11; FF XXI, Pet. Cert. App. D-18; CL VII, Pet. Cert. App. D-21; Order and Judgment, Pet. Cert. App. E 3-4. While this case was *sub judice* before the Washington Supreme Court, during the 1975-76 winter steelhead season the trial court exercised its continuing jurisdiction over the on-reservation fishery and entered a temporary restraining order against further treaty fishing on a finding that the tribe "has exceeded its treaty entitlement of 2,866 steelhead for the 1975-76 winter steelhead run." Order of February 3, 1976. On February 6, 1976, the trial court entered another order directing the Puyallup Tribe, through its officers, to enact a closure of tribal steelhead fishing and to enforce it. This was followed, on February 27, 1976, by a judgment reiterating the closure directive and directing the Department of Game to take on-reservation enforcement action.

After the grant of certiorari in the instant case on November 29, 1976, the Pierce County Superior Court has continued to exercise its powers against the tribe's on-reservation steelhead fishery. On application of the Game Department, the court on December 14, 1976, entered a temporary restraining order directing the

[6] FF XXII, Pet. Cert. App. D-19.

[7] Order and Judgment, Pet. Cert. App. E-3.

tribe to close its fishery and to enforce the closure. On December 22, 1976, the trial court entered a "closure order," declaring that "the Puyallup Tribe and its members treaty entitlement to the 1976-77 steelhead run in the Puyallup River is 670 steelhead as established under the court's formula previously entered in this matter." The court found that the tribe had exceeded its 670 fish entitlement, ordered the tribe to cease net fishing in the Puyallup River, and authorized on-reservation enforcement activity by the Department of Game. The injunction also contained a provision declaring that any catch in excess of the 670 fish limit "may be offset" against future tribal catches.

With the single exception of the steelhead run on the Puyallup River, state authorities in the last several years have never sought to invoke the powers claimed here to curtail on-reservation fishing. Routinely, treaty fishing disputes are referred to, and disposed of, by the federal district court in the exercise of its continuing jurisdiction. *See* note 2, *supra*.

The steelhead that is the subject of this controversy is an anadromous trout, spawned naturally in fresh water streams and rivers. Normally, after two years in a freshwater environment the steelhead will migrate to salt water for another two years, returning to the place it was born to spawn. (FF V, Pet. Cert. App. D-10). Unlike the salmon, a small number of steelhead spawners, perhaps 5 to 20 percent (*Id.; see* R. 198, 200, 630-31), may survive the spawning act and migrate again to salt water. The State of Washington classifies steelhead as a game fish, RCW 77.08.020, and forbids commercial trafficking in it. RCW 77.16.040. Steelhead destined for South Puget Sound waters of the Puyallup River are nonetheless subject to a heavy com-

mercial fishery, principally foreign fishing on the high seas (App. 52; R. 323, 379-80). Steelhead also are caught in Washington waters incidental to the commercial catch of salmon. (R. 116). Perhaps 5 percent of the steelhead smolt migrating from the Puyallup River will return to spawn (R. 102-03, 421).

The steelhead catch in western Washington is but a fraction of the overall catch of four species of salmon (chinook, silver, chum and pink). In 1971, for example, 246,000 steelhead were caught and 7,777,000 salmon, with steelhead representing only 3.3 percent of the total steelhead-salmon take (App. 36; R. 209-10). Steelhead make up perhaps 10 percent of the total Puyallup tribal salmon-steelhead fishery (R. 943, 1061). Because of its location in South Puget Sound at the end of the migration routes, the Puyallup tribal fishery has access only to stocks surviving commercial and sport fisheries occurring earlier. The reservation is found in the lower reaches of the river (FF XVII Pet. Cert. App. D-17, R. 756-57),[8] and the Indian steelhead fishing occurs there. (App. 79, R. 773). Sports fishing occurs on the reservation (R. 811) and at points upriver (R. 115). Indian closures on the weekends (R. 768, 809) and some net fishing at night (App. 64, R. 509-10) help reduce conflicts between the two user groups.

Proof at trial during June 1974 established that there are 20 full time tribal fishermen, 20 more who fish on a part time basis, and 20 others who fish occasionally but rely heavily on different runs for income

[8] The Muckleshoot Reservation is located in the upper reaches of the watershed on the White River (R. 917). The tribe argued to the trial court and on appeal that the Muckleshoot Tribe was an indispensable party to any allocation decision. The court below did not address the point.

(FF XV, Pet. Cert. App. D-16; R. 758-60). The 20 full time fishermen support not only themselves and their families but also another 10 families. (R. 759). As many as 150 members of the tribe are supported by these year round fishing activities. (R. 759). The income of tribal members is low, and is heavily dependent upon fishing opportunities. (R. 760-61). While steelhead make up only 10 percent of the total tribal catch, each fish brings approximately $10 on the commercial market (App. 92; R. 1048-49). The steelhead is important economically and for subsistence purposes because it is the only fish in the river during the months of December and January (*See* R. 337, 792-93, 896).

The Puyallup Tribe is organized under Section 16 of the Indian Reorganization Act of 1934, 48 Stat. 984, 987, Attachment 3a, now codified as 25 U.S.C. § 476. (R. 754). The tribe has approximately 850 members according to figures of the Bureau of Indian Affairs (R. 755). Under the tribe's constitution and bylaws, the council exercises governing responsibilities. (R. 754). The chairperson of the tribe, Ms. Ramona Bennett, is a member of the council (R. 755) and testified at trial. The tribe has regulated its fisheries for a number of years by enactment of ordinances, and openings and closures. (R. 762-73, 777, 779, 801, 803-05, 900, 905, 924-25; Exh. 74-P, 74-Q). Indeed, the regulation enacted by the Game Department approving a tribal steelhead fishery for the 1973-74 season following this Court's decision in *Puyallup II* borrowed heavily from existing tribal ordinances. (R. 489, 802). Biological expertise for tribal management of its fisheries is provided by the Northwest Indian Fisheries Program of the United States Fish and Wildlife Service, whose director testified at trial. (R. 671-753, 960-1063). The

chief witness for the Game Department described the 1973-74 Puyallup River tribal steelhead fishery as "rather orderly," with closed periods being honored "very carefully." (R. 1103-04, 802).

The tribe now fishes under the auspices of the federal court decision of Judge Boldt, which calls for information exchanges among parties and the filing of tribal and state fishing regulations with the court. *See* 384 F. Supp. at 420. At the time of trial in the instant case, occurring some three months after the initial Boldt decision and before the major autumn fisheries, the tribe was without a biologist apart from the experts provided by the Northwest Indian Fisheries Program (App. 89-90; R. 768, 811, 924, 934) and had engaged in no steelhead or salmon hatchery planting programs (*see* R. 768, 896). In the two and a half years since trial these facts have changed:[9] the tribal fisheries management office now has a staff of ten, including two biologists. The office has commenced its own data collection system, including catch data and stream surveys, and has undertaken an enhancement program to rebuild depleted fishing stocks. During 1976, over 200,000 salmon were planted by the tribe in various tributaries of the Puyallup watershed. The Council has adopted a Fisheries Management Code, and each spring adopts annual fishing regulations for the upcoming season; these are updated by emergency regulations throughout the season, which have been adopted on approximately a dozen occasions each of the three fishing seasons since the trial. The tribe now employs two full time and one part time enforcement officers, and receives the services of one Bureau of Indian Affairs officer who is assigned to the tribe.

[9] These are representations of counsel.

The tribal steelhead net fishery, by all accounts, is accomplished without trespassing on private lands. The Puyallup fishermen anchor their set nets to bridges and employ small boats to place their drift nets. (*See* App. 86; R. 486-87, 805). Obviously, the fishing takes place in the river and thus within trust lands. The trial court's finding that the tribe intended to take 90 to 100 percent of its future steelhead harvest within the reservation boundaries (FF XVIII, Pet. Cert. App. D-17) is predicated on the fact that there is no need to go elsewhere because the fish migrate through the reservation (App. 79-80; R. 773). The actual steelhead catch by tribal fishermen for the 1973-74 season was estimated by the U.S. Fish and Wildlife Service to be approximately 1,900 fish (R. 971-72), although the Department of Game put the figure at roughly 3,000 (R. 1103). In any event, the tribal catch did not exceed the 3,300 fish allocation ordered initially by the trial court. (FF XXII, Pet. Cert. App. D-19; Order and Judgment, Pet. Cert. App. E-3).

Proof at trial dwelt mostly on the respective sizes of natural and hatchery steelhead runs in the Puyallup River, the funding origins of the hatchery plants, the interrelationships between hatchery and natural fish, and the reliability of methods for distinguishing between the two. Factual representations made to this Court during argument in *Puyallup II*[10] are revised substantially by the present record: the size of the

[10] 414 U.S. at 48.

At oral argument counsel for the Department of Game represented the catch of steelhead that were developed from the hatchery program were in one year 60% of the total run and in another 80%. And he stated that approximately 80% of the catch of that program was financed by license fees of sports fishermen.

natural run, assumed to approximate 4,000-6,000 fish during the second appeal of this case, 80 Wn.2d at 572, 497 P.2d at 178, was fixed by the trial court at 14,715 fish (FF XII, Pet. Cert. App. D 14-15), in light of estimates extracted from the Game Department of a combined natural-hatchery run of 56,000 fish (Exh. 74-U; *see* R. 1065-67). The size of the hatchery steelhead run was found to represent not 60 or 80 percent of the total run but only 50 percent. (FF XI, Pet. Cert. App. D 14). The state game fund supports approximately two thirds of the operating costs of the Game Department's statewide steelhead program. (App. 30-31; R. 144-46). Altogether hunting and fishing license fees account for 75 to 80 percent of the operating funds of the Department of Game (FF IV, Pet. Cert. App. D 9-10), with about half of the revenue coming from hunting licenses and half from licenses relating to fishing. (*See* R. 164, 232.) Steelhead fishermen account for approximately 25 percent of the funds derived from fishing licenses. (Most sportsmen fish for trout.) (*See* R. 233, 238). Stated another way, steelheaders account for 10 percent of the entire Game Fund (App. 40; R. 164, 240-41), not the 80 percent suggested to the Court in *Puyallup II*. On a capital investment basis, according to the principal witness for the Department of Game, the replacement value of the Department's steelhead hatchery program facilities is $33 million, three-fourths of which is accounted for by federal and mitigation money compensating for fisheries resources destroyed by hydroelectric and other projects. (R. 133-37). If forced to rely on state funding alone, the Department would be able to produce only slightly in excess of 1 million of the current annual steelhead production of 5 million smolts (*See* FF IX, Pet. Cert. App. D-12; App. 55-56, R. 404-06).

RULINGS BELOW

Throughout the trial and in several post trial submissions, the petitioners, defendants below, argued the issues raised here of lack of state power to regulate fishing on-reservation and tribal sovereign immunity. These contentions were rejected by the trial court (Memorandum Decision, Pet. Cert. App. C-51; Findings and Conclusions, CL I, Pet. Cert. App. D-19, CL VII, Pet. Cert. App. D-21; Order and Judgment, Pet. Cert. App. E-3) and by the state Supreme Court (86 Wn.2d at 668-69, 678-79, 687-88, 548 P.2d at 1063, 1069, 1074, Pet. Cert. App. B 5-8, 27, 43). In the opinion of the Supreme Court of Washington, tribal sovereign immunity and on-reservation jurisdictional objections were without merit for two reasons: first, the court read this Court's rejection of sovereign immunity claims in *Puyallup I* (391 U.S. at 396 n.11) as still controlling because the case was analogized to "a suit to enjoin violations of state law by individual tribal members fishing off the reservation." 86 Wn.2d at 668, 548 P.2d at 1063, Pet. Cert. App. B-6. Second, the court read the remand in *Puyallup II* as mandating an allocation of the entire steelhead run, and enforcement of that allocation by state authorities without regard to reservation boundaries. *Id.* at 668, 548 P.2d at 1063, Pet. Cert. App. B-6. On the issue of the treaty applicability to hatchery fish,[11] various reasons were assigned for denying an Indian entitlement. The disposition of the state Supreme Court, with one important qualification, was to affirm the judgment of the trial court in all respects. The qualification took the form of a direction to the Department of Game to de-

[11] Certiorari was not sought on this second issue. See pp. 38-40 *infra*.

termine annually the size of the natural steelhead run on the Puyallup River and the number of fish represented by the tribe's share (45 percent), and to enforce that allocation. 86 Wn.2d at 686, 688, 548 P.2d at 1073-74, Pet. Cert. App. B 41, 44.

Chief Justice Stafford joined by three other justices concurred in the result on the ground that *Puyallup II* mandated an apportionment between treaty and non-treaty fishermen of the entire steelhead run. "At first blush," Chief Justice Stafford wrote, "it would appear that the State lacks the necessary power to enforce the equitable apportionment directed by the United States Supreme Court," citing such cases as *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832), and *Menominee Tribe* v. *United States,* 391 U.S. 404 (1968). But Chief Justice Stafford assumed nonetheless that *Puyallup II* must be read as repudiating *sub silentio* this line of authority: "If the Supreme Court had not recognized the existence of a State power to control and supervise the mandated allocation, the Supreme Court's direction would, for all practical purposes, be impossible to establish, implement, and enforce." 86 Wn.2d at 689-90, 548 P.2d at 1075, Pet. Cert. App. B 46-48.

Justice Rosellini, concurring in part and dissenting in part, reasoned that the Treaty of Medicine Creek could not have reserved an exclusive right to fish and control fishing on-reservation, pointing out that such a right is reserved with specificity in the Walla-Walla Treaty. *Id.* at 693, 548 P.2d at 1077, Pet. Cert. App. B 55-56. He would find a denial of equal protection to other citizens in any treaty right that gives Indians superior rights. *Id.* at 694, 548 P.2d at 1077, Pet. Cert. App. B 57-58.

SUMMARY OF ARGUMENT

I

The decision below, authorizing state regulation of on-reservation fishing, flouts settled principles of Indian law well understood since the early days of the Republic. The test of validity of a state regulatory measure on the reservation, repeatedly applied by this Court, is whether it impairs a federally reserved right or interferes with tribal self-government.

This standard is twice fatal to the exercise of state power here asserted against the tribe. The Treaty of Medicine Creek, 10 Stat. 1132, reserved exclusive fishing rights on the reservation to the tribe, and there is not a shred of statutory support for the claim that Congress has rescinded that original commitment. Indeed, the notorious Public Law 280. Attachment 2a, authorizing deep intrusions of state authority into on-reservation activities, specifically protects rights of the tribes to regulate their own fishing. 18 U.S.C. § 1162 (1970); 25 U.S.C. § 1321(b) (1970). The decision below cheapens these federally reserved rights severely, and does so with a series of mandates that reduces tribal self-government to a mockery. The case law, overwhelmingly and without exception, disavows state attempts to control on-reservation fishing.

II

Even off the reservation, this Court has made clear that the state must demonstrate "that its regulation is a reasonable and necessary conservation measure, . . . *and* that its application to the Indians is necessary in the interest of conservation." *Antoine* v. *Washington,* 420 U.S. 194, 207 (1975) (emphasis in original). The

allocation and enforcement aspects of the decision below do not purport to meet this standard, and plainly could not do so on this record. The decision would be wrong were it applied to an off-reservation fishery, and it is twice wrong because it is applied to an on-reservation fishery. Language in the opinion suggesting that there are no treaty rights to net fish, and the theory espoused in support, frankly defies earlier decisions of this Court and disinters arguments put to rest as long ago as *United States* v. *Winans*, 198 U.S. 371 (1905).

III

Wholly apart from the question of the reservation fishery, the decision of the Washington Supreme Court offends well established principles of tribal sovereign immunity by extinguishing tribal rights in more than three-fourths of the harvestable steelhead in the river and imposing other administrative burdens. A suit in state court against the tribe to decree an allocation of one of the Puyallup River salmon runs would be subject to summary dismissal on sovereign immunity grounds. The result should not be different where, as here, an action initiated more than thirteen years ago gradually evolves into an attempted adjudication of tribal community fishing rights. The tribe's sovereign immunity argument was rejected by this Court in *Puyallup I* only on the assumption that the case was analogous to the prosecution of individual Indians for crimes committed off reservation lands. 391 U.S. at 396 n.11. This premise is shattered by the present record: the fishing here occurred on-reservation, individual fishermen had nothing to do with the case, and the issues involved solely federal treaty rights.

IV

Principles of collateral estoppel, alone and in combination with the other grounds, foreclose the state from reasserting the power to regulate the tribal steelhead fishery. Washington State already has litigated and lost the question of the continued existence of the reservation and its power to regulate the on-reservation fishery. *United States* v. *Washington*, 496 F.2d 620 (9th Cir.) (per curiam), *cert. denied*, 419 U.S. 1032 (1974). By authorizing state officials to divide up the fishery and to enforce these decisions on-reservation, the decision below permits the reassertion of an authority previously withheld by a fully contested federal judgment. This is but the most recent arrival in the long line of theories in this litigation making determined inroads upon federally protected rights.

V

Certiorari was sought on the single question of state power to regulate on-reservation fishing, and review should be confined to that issue. Dismissal of the case on jurisdictional or sovereign immunity grounds would make it unnecessary to explore the grounds for allocation. This conclusion is reinforced by intensely practical considerations. The issue of treaty entitlement to hatchery fish under all the Northwest Indian treaties is presently being litigated in the federal district court and ought to be resolved there.

ARGUMENT

I

State Administrative Agencies and Courts Are Without Power To Adjudicate Tribal Entitlement to On-Reservation Fisheries and To Enforce the Decrees

By holding that state authorities may regulate tribal fishing on the reservation, the court below contradicts settled principles of Indian law going back to the early days of the Republic. The concurring opinion of Chief Justice Stafford recognizes the problem by acknowledging that "it would appear that the State lacks the necessary power to enforce the equitable apportionment directed by the United States Supreme Court." 86 Wn.2d at 689, 548 P.2d at 1075, Pet. Cert. App. B 46-47. Indeed, state authorities have conceded the very point they are rearguing here in the ongoing treaty fishing litigation in the federal district court[12] and for that matter more than thirty years ago before this Court in *Tulee* v. *Washington,* 315 U.S. 681, 683 (1942).[13]

By reading *Puyallup II* as discarding this unbroken line of precedent, the state Supreme Court departed from well established principles protecting the authority of an Indian tribe to regulate the conduct of its members free from state interference. *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515, 559 (1832), of course

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[12] *See* 384 F. Supp. at 341:

> All parties in this case agree that on-reservation fishing is not subject to state regulation and no issue to the contrary is presented in this case.

An identical concession was made by Counsel at trial in the instant case. *See* App. 20-21; R. 20-21.

[13] "The state does not claim power to regulate fishing by the Indians in their own reservation."

makes clear that the tribes are recognized as "distinct, independent, political communities" qualified to exercise powers of self-government "not by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignity." F. Cohen, *Handbook of Federal Indian Law* 122 (1942). This principle has survived in decisions of this Court through *Ex Parte Crow Dog,* 109 U.S. 556 (1883), holding that tribal courts alone had jurisdiction over the murder on-reservation of one Sioux Indian by another, and *Williams* v. *Lee,* 358 U.S. 217 (1959), forbidding the exercise of state court jurisdiction over a suit by a non-Indian to collect on a debt incurred on-reservation, to *McClanahan* v. *Arizona State Tax Comm'n,* 411 U.S. 164 (1973), barring the imposition of a state income tax on earnings of Indians derived from on-reservation activities. Whether the theory be one of tribal sovereignty or federal preemption by treaties and statutes, *see id.* at 172, the questions to ask, according to *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 148 (1973), are whether the particular state initiatives would "interfere with reservation self-government or would impair a right granted or reserved by federal law." Only last term the Court applied this teaching to foreclose state court jurisdiction over an Indian adoption proceeding where the parties resided on-reservation and the conduct occurred there. *Fisher* v. *District Court,* 424 U.S. 382, 386 (1976) (per curiam); *see Moe* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation,* 425 U.S. 463, 480-81 (1976). *See also Seymour* v. *Superintendent,* 368 U.S. 351 (1962).

That the exercise of state power here at issue erodes rights federally reserved is, we submit, overwhelmingly

clear. Not only can the state identify no federal statutory authority justifying this unprecedented encroachment upon on-reservation Indian fishing activity, the legislation that can be found points the other way. The starting point of course is the Treaty of Medicine Creek reserving to the tribe the "exclusive use" of reservation lands, 10 Stat. 1132 (1854), Attachment 1a-2a, and along with it exclusive powers to control on-reservation fisheries. *Menominee Tribe* v. *United States,* 391 U.S. 404, 405-6 (1968); *United States* v. *Winans,* 198 U.S. 371, 381 (1905); *United States* v. *Washington,* 520 F.2d 676, 690 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976). The state that is here claiming the power reserved to the tribe by federal treaty was not admitted to the union for another thirty-five years, and then by an enabling act preserving existing rights of the Indians. 25 Stat. 676, 677 (1889).[14] Although the Congress from time to time has invited the exercise of state powers over certain on-reservation activities, the conditions of these waivers must be carefully read, *see Kennerly* v. *District Court of Montana,* 400 U.S. 423 (1971) (*per curiam*), and none comes close to authorizing the interference with federally protected rights contended for here. The well known Public Law 280, 67 Stat. 588 (1953), surrendering jurisdiction over Indian country to the states under certain circumstances,[15] specifically withholds from the state civil, 25 U.S.C. § 1322(b) (1970), and criminal courts, 18 U.S.C. § 1162 (1970), the power to

[14] A comparable provision appears in the Washington State Constitution, Article XXVI.

[15] It is subject to judicial notice that the Puyallup Tribe never has consented to the assumption of 280 jurisdiction by the state. *See* 25 U.S.C. § 1322(a) (1970).

adjudicate rights in tribal natural resources. The words of 18 U.S.C. § 1162 (1970) repeated verbatim in section 401(b) of the Civil Rights Act of 1968, 82 Stat. 78-79, 25 U.S.C. § 1321(b) (1970) [16] hardly could be more specific:

> Nothing in this section . . . shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

Notwithstanding these mandates, the state in the past repeatedly has applied its civil and criminal processes to interdict tribal fishing on the river. *See* R. 777-78, 824-26; *United States* v. *Washington,* 384 F. Supp. 312, 358, 388 (W.D. Wash. 1974), *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976). By inviting state authorities to close fisheries on the reservation and to enforce these edicts, the court below continues to sanction an interference with federally protected rights that is at war with the specifics of the Treaty of Medicine Creek and longstanding congressional policies carefully hedging the reach of state authority on federal Indian reserves. *Compare Metlakatla Indian Community* v. *Egan,* 369 U.S. 45, 58 (1962) (reading Public Law 280 as disclaiming "the intention to permit states to interfere with federally granted fishing privileges or use of properties").

Nor is there any doubt that the state power applied here encroaches heavily on the Indians' right "to make

[16] An identical disclaimer of state jurisdiction as regards Indian fishing appears in RCW 37.12.060. *See* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians,* 22 U.C.L.A. L. Rev. 535, 547 (1975). The provision was cited in the briefs below but not in the opinions.

their own laws and be ruled by them." *Williams* v. *Lee,* 358 U.S. 217, 220 (1959); *see Bryan* v. *Itasca County,* 96 S. Ct. 2102 (1976). Indeed, one wonders what remains of the tribe's power to govern itself under the terms of Section 16 of the Indian Reorganization Act of 1934, Attachment 3a-4a, *infra,* 25 U.S.C. § 476 (1970). The state courts have asserted nothing short of an authority to nullify tribal regulation of the single activity that is indispensable to the economic well being of the members and their traditional values. It is difficult to conceive of an intervention in tribal self-government more demeaning and decisive than an order to its governing body to enact and enforce an ordinance curtailing the membership's chief economic activity. This is not a tax on income earned, as was condemned in *McLanahan,* but a ban on earning income. The court below has approved the exercise of a continuing jurisdiction, replete with administrative details, that places the practical governance of an important tribal fishery in the hands of state officials whose hostility has been clearly recorded. *See United States* v. *Washington,* 520 F.2d 676, 693 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976) (Burns, J., concurring) ("The record in this case, and the history set forth in the *Puyallup* and *Antoine* cases, among others, make it crystal clear that it has been recalcitrance of Washington state officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court"). In the years following the *Puyallup II* decision, the tribal share of steelhead has been recomputed downwards by state authorities in rapid succession to be 3310 or 3280 fish (1974-75), then 2866 fish (1975-76) and now 670 fish (1976-77). These "allocations" are made despite the acknowledged inability

of the Department of Game to predict run size. (App. 53, R. 380-81, 775, Exh. 74-R). *Puyallup I* and *Puyallup II* record the eventual point of satisfaction of this untrammeled state power.

The judgment below, by authorizing state control over an on-reservation fishery, conflicts either with direct holdings or considered dicta of an unbroken line of authority, including decisions of this Court, *Menominee Tribe* v. *United States,* 391 U.S. 404, 411 n.12 (1968) ("the exercise of rights on reservation lands guaranteed to the tribe by the Federal Government would not be subject to state regulation, at least in absence of a cession by Congress"); *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78 (1918) (affirming restraint against non-Indian encroachment upon reservation fisheries); decisions of the lower federal courts, *United States* v. *Washington,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976); *Kimball* v. *Callahan,* 493 F.2d 564, 568 (9th Cir.), *cert. denied,* 419 U.S. 1019 (1974) (even though the former reservation lands in question were "no longer legally occupied by the Klamaths"); *Moore* v. *United States,* 157 F.2d 760 (9th Cir. 1946), *cert. denied,* 330 U.S. 827 (1947); *Colville* v. *Washington,* 412 F. Supp. 651 (E.D. Wash. 1976); *Quechan Tribe* v. *Rowe,* 350 F. Supp. 106 (S.D. Cal. 1972); *Leech Lake Band of Chippewa Indians* v. *Herbst,* 334 F. Supp. 1001 (D. Minn. 1971); *Klamath & Modoc Tribes* v. *Maison,* 139 F. Supp. 634 (D. Ore. 1956), *modified,* 338 F.2d 620 (9th Cir. 1964); *Mason* v. *Sams,* 5 F.2d 255 (W.D. Wash. 1925); *United States ex rel. Lynn* v. *Hamilton,* 233 Fed. 685 (W.D.N.Y. 1915); *In re Lincoln,* 129 Fed. 247 (N.D. Cal. 1904); *In re Blackbird,* 109 Fed. 139 (W.D. Wis. 1901); *Oneida Tribe of Indians* v. *United States,* 165 Ct. Cl. 487,

cert. denied, 379 U.S. 946 (1964); and of the state courts, *Donahue* v. *California Justice Court,* 15 Cal. App.3d 557, 93 Cal. Rptr. 310 (1971), *cert. denied,* 404 U.S. 990 (1971); *see People* v. *Jondreau,* 384 Mich. 539, 185 N.W.2d 315 (1971). There is, in short, not a shred of precedent for the assertion of state power here involved, as prior concessions so thoroughly attest.

In *Mattz* v. *Arnett,* 412 U.S. 481, 506 (1973), this Court held that the Klamath Indian Reservation had not been terminated by Act of Congress and therefore remained "Indian Country" for purposes of 18 U.S.C. § 1151. The Court pointed out, however, that it was deciding nothing regarding the existence of Mattz's fishing rights or the application of California law notwithstanding the reservation status, 412 U.S. at 485, although on remand the state court applied the general rule foreclosing state jurisdiction over on-reservation fishing. *Arnett* v. *Five Gill Nets,* 48 Cal. App.3d 454, 461-62, 121 Cal. Rptr. 906, 911-12 (1975), *cert. denied,* 425 U.S. 907 (1976). In the instant case the court below, mistakenly we believe, read this Court's remand in *Mattz* as making state jurisdiction over on-reservation fishing an "open question," 86 Wn.2d at 668, 548 P.2d at 1063, Pet. Cert. App. B-7, then proceeded to resolve it against the tribe. The decision thus misreads *Mattz,* misconstrues the scope of the remand in *Puyallup II,* and contradicts other settled principles of Indian law. All are sufficient reasons to require correction here.

II

Indian Fishing, Even When Off-Reservation, Can Be Curtailed by the State Only Upon a Compelling Justification of Conservation Necessity

Ironically, the decision of the Supreme Court of Washington has transformed this Court's reversal in *Puyallup II* of the Game Department's consistent refusal to recognize Indian rights into an instrument for eroding those rights still further by summary use of state powers. Indeed, the precise holding of this Court in *Puyallup II,* that a ban on Indian net fishing offends the treaty, is repudiated by the court below, 86 Wn.2d at 671, 678-80, 687, 548 P.2d at 1065, 1068-70, 1074, Pet. Cert. App. B 13-14, 26-28, 30-31, 43, with the wholly understandable expectation that the tribe would be forced to seek redress here.

Puyallup I makes clear that off-reservation Indian treaty fishing may be regulated by the state in the interest of conservation. 391 U.S. at 396 n.11, 398.[17] The state "must demonstrate that its regulation is a reasonable and necessary conservation measure, . . . *and* that its application to the Indians is necessary in the interest of conservation." *Antoine* v. *Washington,* 420 U.S. 194, 207 (1975) (emphasis in original), citing *Department of Game* v. *Puyallup Tribe (Puyallup II),* 414 U.S. 44 (1973); *Tulee* v. *Washington,* 315 U.S. 681, 684 (1942). While the Court in *Antoine* specifically declined to embrace the familiar compelling state interest test to scrutinize state closures of off-

[17] Even this concession of state power is a close one, resting as it does on the assumption that the Article III reservation of federal treaty rights "in common with" citizens of the territory is non-preemptive. *See* Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error,* 47 Wash. L. Rev. 207 (1972).

reservation Indian fisheries, 420 U.S. at 207; *see* Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1 (1972), it is clear, we submit, that state conservation closures must be strictly justified, carefully tailored, and applied to Indians only if necessary. That is the standard presently governing all western Washington off-reservation Indian treaty fishing, *United States* v. *Washington,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976), as well as the Columbia River fisheries. *See Sohappy* v. *Smith,* 529 F.2d 570 (9th Cir. 1976).

By eschewing this standard of conservation necessity, the decision below would be wrong if applied to an off-reservation fishery, and is twice wrong applied to an on-reservation fishery. In its vital particulars, the decision of the Washington Supreme Court authorizes the Game Department to estimate the size of the returning natural and hatchery runs,[18] identify 45 percent of the harvestable run as the tribal share, and enforce that allocation by closures on-reservation without regard to conservation necessity. That is exactly what happened during the winters of 1975 while the case was *sub judice* before the Washington Supreme Court and of 1976 while the case was pending here. *See* p. 8-9, *supra.* In 1975 the trial court chose to invoke its continuing jurisdiction, recompute downwards

[18] The Game Department admits an inability to make run size predictions. (App. 53; R. 380-81, 775). The chief witness for the Department conceded that his figures on natural run size had "decided limitations" and that to allocate the fishery pursuant to court order "in a meaningful way" would require "broader information and more complete information which could be obtained through a special designed effort to do so." (App. 51; R. 352; *see* 353, 696-97, 724-25).

the tribal share (from 3,310 fish to 2,866 fish) and order an on-reservation closure without a colorable conservation justification. The same exercise was repeated in 1976, except that the tribal share triggering injunctive relief had shrunk to 670 fish.

By reading *Antoine* and *Puyallup I* as guaranteeing Indian access to their traditional fishing grounds but not necessarily to the fish swimming by, *see* 86 Wn.2d at 676, 548 P.2d at 1068, Pet. Cert. App. B-23, the Washington Supreme Court unmistakably reads the constraints out of this Court's qualified recognition of a state power to interdict off-reservation Indian fisheries posing a genuine threat to the perpetuation of a particular run of fish. Indeed, the opinion below, while purporting to subject the Indian fishery to the same regulatory regime as the nontreaty fishery,[19] does not even attempt to justify the constraints approved as "conservation" measures. The position, indeed, is simply a rerun of the argument made and rejected seventy years ago in *United States* v. *Winans,* 198 U.S. 371, 379 (1905), where it was urged that Indian treaty rights "confer[red] only such rights as a white man would have." It is hardly radical to suggest that the state regulatory measures invalidated in *Winans,* not to mention *Antoine* and *Tulee* v. *Washington,* 315

[19] Ironically, in a collateral attack on the rulings of Judge Boldt by non-Indian commercial fishing interests the Washington Supreme Court has left open the issue of whether the state is empowered to implement the federal decision by curtailing nontreaty fishing to allow escapement to the traditional grounds of the tribes. *See Washington State Commercial Passenger Fishing Vessel Ass'n* v. *Tollefson,* 87 Wn.2d 417, —, 553 P.2d 113, 114 (1976), *petition for rehearing granted,* — Wn.2d — (1976). The decision in the instant case thus approves a state power on-reservation against the Indians that is said to be in doubt applied off-reservation to non-Indians.

U.S. 681 (1942), could be reinstated through the simple expedient of characterizing them as measures "to support the state government in its efforts to conserve fisheries resources."

The decision below is improved not at all by the suggestion that the treaty must be rendered a nullity because "equal protection is denied when similarly situated persons, *e.g.*, all state citizens including Indians, [are] treated differently by allowing only a certain class to fish with nets." 86 Wn.2d at 680, 548 P.2d at 1070, Pet Cert. App. B-30. The claim that legislation treating Indians separately amounts to invidious discrimination was put to rest decisively by this Court's unanimous decision in *Morton* v. *Mancari,* 417 U.S. 535, 551-55 (1974), upholding Indian employment criterion provisions. The rationale, embraced by yet another unanimous decision last term, *see Fisher* v. *District Court,* 424 U.S. 382, 390-91 (1976) (per curiam), is that the different treatment derives from the quasi-sovereign status of the tribe and advances a solemn congressional policy of tribal self-government in the Indian Reorganization Act of 1934. That Indians may fish with nets under the terms of the Treaty of Medicine Creek is a small price to pay for the land cessions enjoyed by all citizens of the state today,[20] and it is a price Congress still deems indispensable to the survival of this small tribal entity.

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[20] *See Puyallup Tribe* v. *United States,* 17 Ind. Cl. Comm'n 1 (1966); *Nisqually Tribe* v. *United States,* 29 Ind. Cl. Comm'n 432 (1973) (holding that token payments for lands ceded by the Indians under the Treaty of Medicine Creek were "unconscionable" within the meaning of Section 2 of the Indian Claims Commission Act). The Puyallup Tribe's claim is still pending.

III

Tribal Sovereign Immunity Precludes State Courts From Adjudicating Tribal Community Fishing Rights

By ruling that tribal fishing rights extended to none of the hatchery fish and less than half of the harvestable natural steelhead found in the Puyallup River, the Washington Supreme Court effectively extinguished tribal community fishing rights in more than three-fourths of the harvestable steelhead in the river. By doing so and by going further to authorize a continuing administrative authority over tribal fishermen and catch, the court grossly exceeded its jurisdiction and offended principles of tribal sovereign immunity that are firmly established, misapplying in the process this Court's decision in *Puyallup I.*

Ordinarily, Indian tribes enjoy an immunity coextensive with that afforded the United States. *E.g., United States* v. *United States Fidelity & Guaranty Co.,* 309 U.S. 506 (1940); *Crowe* v. *Eastern Band of Cherokee Indians, Inc.,* 506 F.2d 1231, 1233 (4th Cir. 1974); *Cherokee Nation* v. *Oklahoma,* 461 F.2d 674, 681 (10th Cir.), *cert. denied,* 409 U.S. 1039 (1972). The policy justifications, understandably, derive from the historical political independence of the tribes and Congress' recognition of it. If tribal sovereign immunity operates to bar a suit against a tribe for negligence claims growing out of the operation of a bridge on-reservation, *Haile* v. *Saunooke,* 246 F.2d 293 (4th Cir.), *cert. denied,* 355 U.S. 893 (1957), or of a tribal resort, *Morgan* v. *Colorado River Indian Tribe,* 103 Ariz. 425, 443 P.2d 421 (1968), or of the conduct of an election, *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe,* 370 F.2d 529 (8th Cir. 1967), then one wonders why it does not preclude a lawsuit

that strikes heavily at the income of tribal fishermen by curtailing their opportunities to make a living. Indeed, were a state agency to file suit against the tribe tomorrow in the Pierce County Superior Court, State of Washington, seeking an allocation, let us say, of the Puyallup River coho salmon run, we believe the suit would be subject to summary dismissal on sovereign immunity grounds. The result should not be different where, as here, an action initiated more than thirteen years ago gradually evolves into an attempted adjudication of tribal community fishing rights.

We find nothing that distinguishes the sovereign immunity cases cited above and others [21] from the present situation. There is surely no draconian rule allowing the piling on of claims against an Indian tribe once an initial pleading is found to survive sovereign immunity objections. *Cf.* 6 C. Wright & A. Miller, Federal Practice and Procedure §§ 1588, 1592 (1971). Nor can there be found a Congressional waiver of objections against suit which is a more traditional mode of circumventing sovereign immunity objections. *See Dugan* v. *Rank,* 372 U.S. 609 (1963); *United States* v. *District Court for the County of Eagle,* 401 U.S. 520 (1971); *Namekagon Development Co.* v. *Bois Forte Reservation Housing Authority,* 517 F.2d 508, 510 (8th Cir. 1975); *Fontenelle* v. *Omaha Tribe of Nebraska,* 430 F.2d 143 (8th Cir. 1970); 25 Stat. 444 (1908). This Court more than once has insisted upon a "clear relinquishment" of sovereign immunity insofar

[21] *E.g., Turner* v. *United States,* 248 U.S. 354 (1919); *Lomayaktewa* v. *Hathaway,* 520 F.2d 1324 (9th Cir. 1975), *cert. denied,* 425 U.S. 903 (1976) (action to void coal mining lease); *Tewa Tesuque* v. *Morton,* 498 F.2d 240 (10th Cir. 1974), *cert. denied,* 420 U.S. 962 (1975) (action to cancel a 99 year lease between the tribe and a developer); *Maryland Casualty Co.* v. *Citizens Nat'l Bank,* 361 F.2d 517 (5th Cir.), *cert. denied,* 385 U.S. 918 (1966).

as the United States is concerned, *Dalehite* v. *United States,* 346 U.S. 15, 31 (1953); *cf. Hancock* v. *Train,* 96 S. Ct. 2006, 2012-13 (1976), and would demand no less a showing for the tribes whose rights have been long protected against ambiguous and unarticulated waivers. *See, e.g., Antoine* v. *Washington,* 420 U.S. 194, 199-200 (1975). Not only has the Congress taken no action to subject the tribes to suits in state courts to curtail natural resource holdings, it has acted positively through Public Law 280 to protect fishing rights from a state's judicial process. *See* pp. 22-23, *supra.* It goes without saying that the decision to subject unwilling tribes to state court adjudications of their treaty rights as regards any contested resources (timber, coal, oil, gas, fish, water or otherwise) would be a startling proposition, and one not likely undertaken by the Congress.

The tribe's objection on this point was thought by the Washington Supreme Court, 86 Wn.2d at 668, 548 P.2d at 1063, Pet. Cert. App. B-6, to be answered fully by the ruling of this Court in *Puyallup I* where sovereign immunity defenses were answered as follows: "This case, however, is a suit to enjoin violations of state law by individual tribal members fishing off the reservation. As such, it is analogous to prosecution of individual Indians for crimes committed off reservation lands, a matter for which there has been no grant of exclusive jurisdiction to federal courts." 391 U.S. at 396 n.11, citing among other cases, *DeMarrias* v. *South Dakota,* 319 F.2d 845 (8th Cir. 1963).[22]

[22] *DeMarrias* was overruled by *United States ex rel. Feather* v. *Erickson,* 489 F.2d 99 (8th Cir. 1973) (holding that the Lake Traverse Indian Reservation had not been terminated), *rev'd sub nom. DeCoteau* v. *District County Court,* 420 U.S. 425 (1975) (solely on the ground that the reservation had been terminated).

The Washington Supreme Court, we believe, has misread this narrow rejection of sovereign immunity claims in the early phases of this litigation to make the tribe a virtual prisoner in the state courts, answerable to any claims regarding fishing that happen to be asserted by the state or by any intervenor. A number of factors combine to contradict this reading of *Puyallup I*: first, the Ninth Circuit's decision confirming the existence of the reservation has transformed this litigation from what was presumed to be an off-reservation case to what is known to be an on-reservation case.[23] Wholly apart from the status of the reservation the analogue of the prosecution of individual Indians is exploded thoroughly by a recognition that what has been accomplished is to exempt a substantial segment of the steelhead in the river from the terms of the federal treaty. Defendants are the tribe and its chief executive officer as representative of the tribe, and the rights adjudicated are community treaty rights. At this third trial individual tribal fisherman were not named in the complaints, were not represented by counsel, and did not even appear as witnesses. Indeed, the instant case presents solely federal issues without even a colorable claim of a violation of state law. Allegations of violence during the fishery were included in the Department's amended pleading but were repudiated by a Department witness at trial (R. 1103-05) and are wholly unsubstantiated by the record. No conservation justification is offered for the allocation decisions and none exists. What the court below has done, purely and simply, is to resolve basic issues of federal treaty

[23] This Court always has understood *Puyallup I* to be applicable only to off-reservation activity. *See Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 149 (1973). *Compare* note 22, *supra*.

rights adversely to the tribe over continuing sovereign immunity objections. This is sufficient reason alone for reversal here.

IV

The State and the Game Department Are Barred by Principles of Collateral Estoppel from Relitigating the Issue of State Power To Regulate On-Reservation Fishing.

The decision of the court below is in clear conflict with the decision of the Ninth Circuit confirming the existence of the Puyallup Reservation, *United States* v. *Washington*, 496 F.2d 620 (9th Cir.) (per curiam), *cert. denied*, 419 U.S. 1032 (1974), and of Judge Boldt's decisions, also affirmed by the Ninth Circuit, allocating the Indian and non-Indian catch. *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). The Ninth Circuit decision, holding that the reservation still exists, *a fortiori* resolves the question of the tribe's exclusive power to regulate the fishing of its members on-reservation. Indeed, before the Ninth Circuit the state contested "the continued existence of the Puyallup Indian Reservation and as a consequence, the right of the Puyallup Tribe of Indians to fish, free from state interference, on the part of the Puyallup River lying within the reservation." 496 F.2d at 620. The state now returns to this Court to defend a decision which approves a state interference with on-reservation fishing so decisive in its implementing particulars that it leads to closure orders aimed at the tribal council.

The law of collateral estoppel is well settled, and ordinarily prevents a party from relitigating in another forum issues of fact and law actually litigated and determined by a prior judgment. Restatement of Judg-

ments § 68; Restatement (Second) Judgments § 68 (Tent. Draft No. 1, 1973); *Developments in the Law—Res Judicata,* 65 Harv. L. Rev. 818, 840-50 (1952); *see City of Tacoma* v. *Taxpayers,* 357 U.S. 320 (1958); *International Ass'n of Machinists & Aerospace Workers* v. *Nix,* 512 F.2d 125, 132 (5th Cir. 1975). Here, the state has litigated to a conclusion in the federal courts factual and legal questions regarding reservation status and the consequent power of the state to regulate the tribal fishery on the reservation. The district court in the reservation case had granted the state's motion confirming its power to regulate the taking of fish on the river by tribal fishermen. In its brief on appeal the state fully argued the reservation termination and regulatory power questions,[24] only to be told by the Ninth Circuit that the reservation still exists and that the tribe could fish "free from state interference" within its boundaries. 496 F.2d at 620. Yet the basic pleading upon which this case was tried for a third time prayed for a declaration that the Game Department possesses "the sole and exclusive authority to promulgate regulations for the taking of steelhead trout" by members of the Puyallup Tribe "in the bay, the river, and its tributaries." (App. 5).

The decision of the court below, by cooperating in this relitigaion, permits the state to reassert an authority previously withheld by a fully contested federal

[24] The first two issues presented for review, according to the Brief for Appellee, p. 3, *United States* v. *Washington,* No. 73-1793 (9th Cir.) were:

A. Whether the Cushman Act of 1904 indicated Congressional intent to terminate the Puyallup Indian Reservation?

B. Whether the descendents of the Puyallup Tribe of Indians own any uplands, the river bed, or the fish in the Puyallup River where it runs through the original 1873 boundaries.

judgment. By holding that state regulation may ensue despite reservation status, the tribe's long awaited success in winning judicial recognition of the reservation is rendered a nullity. Too soon it appears the tribe was led to believe that the Ninth Circuit settled, once and for all, the question whether the conveyance to private ownership of most of the lands within the reservation extinguished also valuable on-reservation fishing rights without tribal consent, without compensation, and without congressional or executive approval.

As this litigation approaches its fourteenth anniversary, the Puyallup Tribe urges the Court to consider the practices sought to be validated here against the pattern of prior arguments whose only constancy is a dogged pursuit of a diminished Indian fishery. State authorities have argued, at various times in the litigation, that the Puyallup Tribe was defunct and its members without rights under the treaty, that the treaty is but a scrap of paper entered into without consideration from "a conquered people" having no "right or title to anything," *Dep't of Game* v. *Puyallup Tribe (I),* 70 Wn.2d 245, 249, 422 P.2d 754, 756 (1967), that the state has full power to regulate on-reservation because the reservation does not exist, 70 Wn.2d at 253, 422 P.2d at 759; *see Satiacum* v. *Washington,* 414 U.S. 1 (1973) (per curiam) (holding that the federal question of the existence of the Puyallup Reservation had been decided unnecessarily), that the power to regulate off reservation for conservation purposes includes the power to preclude totally Indian net fishing in favor of sport fishing, *Dep't of Game* v. *Puyallup Tribe* (II), 414 U.S. 44 (1973), and now, that despite the existence of the reservation, a state court may proceed anyway to adjudicate on-reservation treaty fishing rights, allocate

the catch, and enforce the allocation. It is time to call a halt to this litigation distinguished only by a proliferation of theories designed to diminish federally protected rights.

V

The Issue of Treaty Entitlement to Hatchery Steelhead Is Not Before the Court and Is Unnecessary to the Decision

The petition for certiorari sought review of the single issue of state power to regulate on-reservation fishing. Usually, review here is confined to the questions raised in the petition, *see, e.g., J.I. Case Co.* v. *Borak,* 377 U.S. 426, 428 (1964); *Irvine* v *California,* 347 U.S. 128, 129 (1954); *General Talking Pictures Corp.* v. *Western Elec. Co.,* 304 U.S. 175, 177 (1938); Sup. Ct. Rules 23 (1)(c), 40(1)(d)(2), and we detect none of the extraordinary circumstances that conceivably could encourage the Court to depart from that principle. *See* R. Stern & E. Gressman, Supreme Court Practice 298-99 (4th ed. 1969). Respondents, however, by the filing of cross-petitions rejected as untimely, note 1 *supra,* by their responses to the petition, and by their record designations for inclusion in the Appendix have made clear an intention to argue here the issue of treaty applicability to hatchery fish. Out of an excess of caution, therefore, we consider it necessary to elaborate briefly on our reasons for believing the issue should not be considered here.

We have argued that the Puyallup tribal steelhead fishery for all practical purposes occurs exclusively on-reservation and thus beyond the regulatory grasp of the state. (Part I, *supra*). The point, we believe, already has been settled by prior litigation, (Part IV, *supra*), and is confirmed by this Court's prior Indian

fishing decisions. (Part II, *supra*). Counsel for the state recognizes that any distinction between hatchery and natural fish "is only material to the off-reservation fishery" (App. 21) which happens to be no longer involved in the case. Regardless of the status of the reservation, we submit it is similarly clear that settled principles of tribal sovereign immunity foreclose a suit in the state courts aiming to exempt from the treaty a sizeable supply of available fish. (Part III, *supra*). Thus for these twin legal reasons of reservation status and sovereign immunity, we believe the courts below were without power to decree tribal entitlement to the steelhead run (whether hatchery or natural) and to enforce any allocation so decreed. Acceptance of this view forecloses any need for inquiring into the basis of any allocation.

Intensely practical considerations reinforce the inappropriateness of this Court addressing the natural-hatchery issue at this time. First, presently pending in the federal district court for the Western District of Washington is Phase II of *United States* v. *Washington* where the parties are litigating actively the entitlement to hatchery fish of all species asserted by all tribes under all treaties in all western Washington waters (p. 5, *supra,*) Second, the instant case, although tried without a jury, produced repeated rulings excluding tribal testimony and exhibits relevant to treaty entitlement to hatchery reared fish. This was true as to evidence offered to show extensive federal funding of western Washington steelhead smolts and hatchery facilities (R. 324, 328, 702-03, 717, 736-40, 744, 989-1004; Exhs. 74-C, 74-K and 74-M), competition for survival between naturally reared steelhead and hatchery plants (R. 328-31; Exh. 74-E, 74-F), and environmental degradation

ATTACHMENT

TREATY OF MEDICINE CREEK AND STATUTES

TREATY OF MEDICINE CREEK AND STATUTES

Treaty of Medicine Creek. 10 Stat. 1132 (1854)

WHEREAS a treaty was made and concluded on the Shenah-nam, or Medicine Creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to wit:—

• • • •

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: . . . . all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens,

and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

Public Law 280, § 2, 67 Stat. 588 (1953), codified at 18 U.S.C. § 1162 (1970), as amended:

§ 1162. State Jurisdiction Over Offenses Committed by or Against Indians in the Indian Country

* * * *

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

The Civil Rights Act of 1968, § 401, 25 U.S.C. § 1321 (1970):

§ 1321. Assumption by State of Criminal Jurisdiction—Consent of United States; Force and Effect of Criminal Laws

* * * *

Alienation, Encumbrance, Taxation, and Use of Property; Hunting, Trapping, or Fishing

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against

alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

Indian Reorganization Act of 1934, § 16, 25 U.S.C. § 476 (1970):

§ 476. Organization of Indian Tribes; Constitution and Bylaws; Special Election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, in-

terests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

Supreme Court, U. S.
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In the Supreme Court

of the United States

OCTOBER TERM, 1976

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STEELHEADERS COUNCIL OF TROUT
UNLIMITED and GARY ELLIS,

Respondents.

BRIEF OF NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED AND GARY ELLIS

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Respondents.

BRIEF OF NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED AND GARY ELLIS

QUESTIONS PRESENTED

1. Should the decision of the Supreme Court of Washington be reviewed on the three issues that were remanded for such decision by this Court?

2. Should the Puyallup Tribe be allowed to prevent this Court from reviewing the basis of the decision of the Supreme Court of Washington?

3. Can the issue of the reservation fishery be meaningfully reviewed without considering the basis of the decision of the Supreme Court of Washington?

4. Should the Supreme Court of Washington be affirmed in deciding that the state has the duty to manage the entire steelhead resource of the Puyallup River in the interest of conservation?

5. Should the Supreme Court of Washington be affirmed in deciding that the hatchery propagated steelhead on the Puyallup River which are paid for with the license fees and tags of sports fishermen be excluded from the commercial fishery of the Puyallup Tribe?

6. Should the Supreme Court of Washington be affirmed in deciding that the treaty language "in common with all citizens of the territory" reserves to the Puyallup Tribe an equitable share of the natural run of steelhead on the Puyallup River?

COUNTER STATEMENT OF THE CASE

The steelhead is a sea-going rainbow trout which originates in Washington rivers, goes to sea, then returns almost always to the river of its birth to spawn and usually to die (Finding V; R. 109; App. 24). Since 1933, Washington state law has made steelhead a game fish to be caught only with hook and line. RCW 77.08.020. The Department of Game of the State of Washington has "the responsibility for the management and conservation of the steelhead resource in this state," (Finding III; RCW 77.08.020

and 77.12.010). Most of the budget of the Department comes from the earmarked license fees paid by sportsmen (Finding IV; R. 162; App. 32-33). Also since 1933, the Department of Game has operated a hatchery program for the artificial propagation of steelhead trout (R. 147; App. 31-32). The hatchery program for the Puyallup River is "virtually entirely financed" by sports fishermen (Finding X; R. 143, 145, 240; App. 29, 30, 57-58).

Northwest Steelheaders Council of Trout Unlimited (intervenor), the largest sports fishing organization in Washington, is dedicated to the conservation of steelhead trout and other fish. Gary Ellis (intervenor) is the Washington state president of the Northwest Steelheaders and a sports fisherman on the Puyallup River (Complaint in Intervention). There are about 150,000 licensed steelhead fishermen in Washington, of whom 5,171 fish the Puyallup River (Finding XIX, Pl. Ex. 74-17; R. 168; R. 508; App. 63-64).

Puyallup Tribe, Inc. is a corporation composed of the 850 members of the Puyallup Tribe of Indians (R. 755; App. 78). The Puyallup reservation consisting of 18,000 acres at the first seven miles at the mouth of the Puyallup River was sold in 1903 except for 22 acres used as a cemetery (Finding XII in first trial). Members of the Tribe live in Tacoma, and other Washington cities and towns (R. 939; App. 90). Twenty tribal members regularly, 20 more part-time and 20 occasionally fish the Puyallup River commercially

Finding XV; R. 758, 759). These 60 include in the number spouses and children and the official roll shows a total of 20 separate family names (Pl. Ex. 74-29; R. 947; R. 950). Puyallup Tribe members also fish with hook and line, and in accordance with Washington law do not pay the license fee paid by other hook and line fishermen (R. 166, 761; App. 33). Ramona Bennett is the chairperson of the Tribe (R. 754).

In 1855 the United States and the ancestors of the Puyallup Tribe signed the Medicine Creek Treaty which included the following language:

> "The right of taking fish, at all usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the Territory." (10 Stat. 1132)

The prior decisions of this Court established that members of the Puyallup Tribe had the right to to fish commercially for steelhead trout despite the Washington statute which made steelhead trout solely a game fish. These decisions also provided that the state of Washington had the right to regulate the tribal fishery in the interest of conservation. This case was remanded: (1) to decide whether hatchery fish were included within the 1855 Treaty, (2) to determine a method of allocating the steelhead run on the Puyallup River between the Puyallup Tribe and the sports fishermen, (3) and to implement a program of management of the resource in the interest of conservation. *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392 (1968) (hereinafter called *Puyallup I*); *Department of Game* v. *Puyallup Tribe*, 414 U.S. 44 (1973) (hereinafter called *Puyallup II*).

A recent Ninth Circuit decision in which these intervenors were not parties has determined that the Puyallup reservation sold in 1903, and now covered with private land holdings in the city of Tacoma, continues to exist. *U. S.* v. *Washington*, 496 F.2d 620 (9th Cir. 1974); cert. denied 419 U.S. 1032 (1974). Another case in which these intervenors were not parties at trial provides for this allocation of *salmon* on the Puyallup River to the Puyallup Tribe: (a) 50% of all the salmon that reach the Puyallup River ("usual and accustomed grounds and stations") and whose escapement is not necessary to preserve the run, plus (b) all salmon caught for subsistence, plus (c) all salmon caught for ceremonial purposes, plus (d) all salmon caught with hook and line in sports fishing season, plus (e) all salmon caught as part of the regular commercial fishery (in the ocean), plus (f) all salmon caught on the reservation, plus (g) compensatory fish for all salmon originating in Washington waters which are caught in the ocean by American non-treaty commercial fishermen. *U. S.* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (Judge Boldt); aff'd. 520 F.2d 676 (9th Cir. 1975); cert. denied 423 U.S. 1086 (1976).

Most of the commercial fishery is for salmon. The total annual steelhead catch in Washington of 246,000 compares with the salmon catch of 7,777,000 (R. 210; App. 36). Salmon is both a commercial and a game

fish (RCW 75.18.005). The federal courts have given to the Puyallup Tribe most of the salmon fishery of the Puyallup River. The steelhead fishery on the Puyallup River which is at issue here is comparatively small (R. 943, 1061).

In this case, Superior Court Judge Brown held in accordance with the concurring opinion of this Court which was not questioned by the majority opinion that (to quote Mr. Justice White):

> ". . . the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen." (*Puyallup II*, 414 U.S. 44, 49 (1973).

Judge Brown found that the hatchery fish are distinguished by a stubbed dorsal fin (due to crowded conditions in the hatchery) and different growth rings on the fish scales (since hatchery fish usually migrate to the ocean at the end of one year of life instead of two years), (Finding XI; R. 106, 176, 574; App. 23, 34, 65). Though hatchery fish cannot be distinguished until caught, they can be statistically separated by proportion in the total run.

Judge Brown found that the average annual run of steelhead on the Puyallup River consists of 14,715 hatchery fish and 14,715 natural fish by taking the average run during a 10-year period when there was adequate Indian reporting. Allowing a 50% escapement of natural steelhead for conservation purposes, he allocated the Puyallup Tribe 45% of the natural harvestable run, or 3,310 steelhead. He retained continuing jurisdiction of the case. (Findings XII; Pl. Ex. 74-2; R. 148; R. 175; R. 357).

The Puyallup Tribe appealed from the Superior Court decision. The Department of Game and Northwest Steelheaders and Gary Ellis cross-appealed solely from that part of the decision in which the court made a specific allocation of the natural run, rather than setting guidelines for an annual allocation by the Department of Game, subject to court review.

The Supreme Court of Washington *en banc* unanimously affirmed Judge Brown except that it ordered the Department of Game, rather than the Superior Court, to determine the numbers of natural run steelhead to be included in the Puyallup Tribe allocation for future years. *Department of Game* v. *Puyallup Tribe, Inc.*, 86 Wash. 2d 664, 548 P.2d 1058 (1976).

The majority opinion of Justice Hunter stressed:

(1) The Treaty language "in common with all citizens of the territory" in accordance with the opinion of this Court in *Puyallup I*, does not grant to the Puyallup Tribe any specific allocation of steelhead on the Puyallup River but rather guarantees the members of the tribe who were not then citizens equal rights with citizens. This is supported by the language of this Court in *Puyallup I* "that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with'." Otherwise citizens who are Indians would be favored over citizens who are not Indians, in violation of the equal protection clause.

(2) The hatchery steelhead which are paid for with the earmarked license fees and tags of sports fishermen should be excluded from the commercial fishery of the Puyallup Tribe both as a matter of Treaty interpretation and equity. The Treaty did not contemplate Indian rights in artificially propagated fish since none then existed. Furthermore, providing hatchery fish for the commercial nets of the Puyallup Tribe would be a subsidy from the sportsmen who pay for the hatchery program.

(3) Then recognizing that the opinion of this Court in *Puyallup II* unless changed mandates an allocation, the decision of the Superior Court that 45% of the natural run should be awarded to the Puyallup Tribe is affirmed as a matter of equitable discretion.

(4) The state of Washington has the duty of managing the entire steelhead resource of the Puyallup River in the interest of conservation.

The concurring opinion of Chief Justice Stafford stresses that this Court has mandated an allocation of the entire steelhead resource on the Puyallup River and then agrees with points (2), (3), and (4) above.

The concurring opinion of Justice Rosellini agrees with point (1) above, and stresses that the treaty language "in common with" means a fair opportunity to catch fish and not any specific allocation. He notes that management of the steelhead resource in the interest of conservation allows regulation of the manner of fishing, rather than solely assuring an adequate escapement. He also said that it would be a violation of the equal protection of others for Treaty Indian fishermen to have all the benefits of citizenship, plus all the benefits of the special fishery they enjoyed before they became citizens.

Petitioners sought a writ of certiorari and respondents joined in the request asking that the entire judgment be reviewed by this Court.

SUMMARY OF ARGUMENT

The decision of the Supreme Court of Washington should be affirmed because it faithfully complies with the instructions of this Court in remanding *Puyallup II*.

(1) The duty of the State to manage the entire steelhead resource of the Puyallup River is necessary to good conservation. (2) The hatchery propagated fish are excluded from the Treaty fishery of the Puyallup Tribe both as a matter of Treaty interpretation and because they are paid for with the license fees and tags of sports fishermen. (3) The allocation of the natural run of steelhead is made in a fair manner in accordance with the Treaty language and the factors set forth by this Court.

The position of the Puyallup Tribe that they are entitled to all of the steelhead because the steelhead spend a few weeks of their life swimming through the reservation is an incorrect interpretation of the Treaty, bad conservation, and contrary to the instruc-

tions of this Court "to accommodate the rights of Indians under the treaty and the rights of other people" *Puyallup II*, 414 U.S. 44, 49. The reservation fishery is so interrelated to the proper decision of the three issues contained in the remand from this Court that it cannot meaningfully be considered separately.

This is a conservation case. We are dealing with the protection of a fragile, diminishing resource of immense value. The primary concern of Northwest Steelheaders Council of Trout Unlimited and its Washington State President, Gary Ellis, is to maintain that bad fish management cannot be good law.

When we point out that the record in this case shows that the Puyallup Tribe has neglected good conservation principles, we recognize that so might any other commercial user group attempting to exercise the power of government. In asking that the hatchery propagated steelhead equitably belong to the sports fishermen who paid for them with license fees and tags, we are encouraging sports fishermen to participate in this program which enhances the resource. In seeking a fair allocation of the steelhead resource on the Puyallup River, we are recognizing that the rights of all fishermen need protecting. We reject federalization of the fishery because we see what is now happening on other Washington rivers with a federal judge as perpetual fishmaster. We know that the steelhead resource of the Puyallup River can best be conserved and the rights of all citizens protected by expert, independent, unified management by the state of Washington.

ARGUMENT

I. The Decision of the Supreme Court of Washington Should Be Reviewed on the Three Issues That Were Remanded for Such Decision by This Court

This Court in *Puyallup II* remanded this case to the courts of Washington to resolve three issues:

(1) to decide whether hatchery steelhead were included within the 1855 Treaty;

(2) to determine a method of allocating the steelhead run on the Puyallup River between the Puyallup Tribe and the sports fishermen; and

(3) to implement a program of management of the resource in the interest of conservation.

Pursuant to the remand, the Pierce County Superior Court, Honorable William L. Brown, Jr. presiding, conducted a ten day trial in May and June, 1974, resulting in a 1,199 page transcript of evidence with 44 exhibits. Puyallup Tribe, Inc. and its Chairperson, Ramona Bennett, were represented by a private attornye from Washington, D. C., a private attorney from Seattle, Washington, an Assistant United States attorney from Seattle, Washington, and an Assistant Regional Solicitor of the U. S. Department of the Interior from Portland, Oregon. The United States Fish and Wildlife Service provided its manager of the Northwest Fisheries Program as expert witness for the Puyallup Tribe.

The decision of the Superior Court which was essentially affirmed by the unanimous Supreme Court

of Washington (with three detailed opinions) spoke to the three issues contained in the remand. On each issue, the Washington Court disagreed with the decision of the Ninth Circuit in *U. S.* v. *Washington*, 520 F.2d 676 (9th Cir. 1975), which deals with salmon on the Puyallup River and both steelhead and salmon on other Western Washington rivers. The disagreements can best be understood by the table that appears on the opposite page.

This conflict between the highest court of the state and the highest court of the circuit is presumably a reason why this Court granted certiorari. Though the decision in this case will not directly affect more than the steelhead run on the Puyallup River, its impact can resolve one of the most difficult controversies ever to divide the citizens of Washington.

II. The Puyallup Tribe Should Not Be Allowed to Prevent This Court from Reviewing the Basis of the Decision of the Supreme Court of Washington

A. The Puyallup Tribe and the United States which has participated in the representation of the Puyallup Tribe have proceeded inequitably in trying to restrict the issues in this case.

After the decision of the Washington Supreme Court, the Puyallup Tribe stated in August, 1976 to Northwest Steelheaders that it would seek certiorari against both the exclusion of the hatchery steelhead from the Treaty commercial fishery and against State regulation of the entire steelhead run on the Puyallup

Questions Presented	This Court in Puyallup I	This Court in Puyallup II	9th Circuit in U. S. v. Washington	Washington Supreme Court in This Case Puyallup III	Actual Effect of Conflict upon Management of the Anadromous Fish Resource in the Western District of Washington
1. Right of the State to Manage the Resource.	"And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power . . . But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians . . . The overriding police power of the State, expressed in non discriminatory measures for conserving fish resources, is preserved." 391 U.S. 392 at 398, 399 (1968)	- - - - - - - - - -	"Therefore, the district court wisely insisted that proposed state regulations be submitted to it for approval before being enforced as to treaty Indians." 520 F.2d 676 at 687 (1975)	The state of Washington is to manage the entire steelhead resource of the Puyallup River in the interest of conservation.	On the Puyallup River at the present time the: 1. Yakima Tribe may self-regulate its own fishery; 2. Muckleshoot Tribe fishery is regulated by Judge Boldt; 3. steelhead fishery of the Puyallup Tribe is regulated by the Washington Superior Court though Judge Boldt has enjoined the Department of Game (but not the Superior Court) from excluding hatchery fish; 4. salmon fishery of the Puyallup Tribe is regulated by Judge Boldt; 5. salmon fishery of non-treaty fishermen is regulated by the State after its regulations are approved in advance by Judge Boldt; 6. steelhead fishery of non-treaty fishermen is regulated by the State (according to the Washington Supreme Court) or by Judge Boldt (according to Judge Boldt).
2. Exclusion of Hatchery Fish from the Treaty Fishery.	- - - - - - - - - -	"We know from the record and oral argument that the present run of steelhead trout is made possible by the planting of young steelhead trout called smolt and that the planting program is financed in large part by the license fees paid by the sports fishermen." Majority op., 414 U.S. 44 at 47 (1973) . . . the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen." Concurring op., 414 U.S. at 49	- - - - - - - - - -	"We hold therefore that the Puyallup Indians have no rights in the hatchery run of steelhead other than those enjoyed by all citizens of the state." 548 P.2d 1058 at 1072 (1976)	On the Puyallup River the Superior Court is excluding the hatchery steelhead from the treaty fishery while the state of Washington (but not the Superior Court) is under federal injunction to include the hatchery fish in the treaty fishery. But under the limited definition of conservation adopted by the federal court, the Nisqually and Puyallup tribes can place nets across the entrance and block the Washington State South Tacoma Hatchery on Chambers Creek which is the source of the hatchery steelhead for the Puyallup River.
3. The Allocation of Fish to Treaty Fishermen.	- - - - - - - - - -	"Only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species. If hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned. What formula should be employed is not for us to propose. There are many variables — the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like." 38 L. Ed.2d 254 at 258 (1973)	(a) 50% of all the salmon that reach the Puyallup River ("usual and accustomed grounds and stations") and whose escapement is not necessary to preserve the run, plus (b) all salmon caught for subsistence, plus (c) all salmon caught for ceremonial purposes, plus (d) all salmon caught with hook and line in sports fishing season, plus (e) all salmon caught as part of the regular commercial fishery (in the ocean), plus (f) all salmon caught on the reservation, plus (g) compensatory fish for all salmon originating in Washington waters which are caught in the ocean by American non-treaty commercial fishermen.	". . . the Indians share equally, i.e., in common with other citizens, the public right to fish and, in addition, are guaranteed access to certain fishing locations." Majority opinion, 548 P.2d 1058 at 1068 "Moreover, we feel constrained by the express language on the face of Puyallup II, when considered independent of Puyallup I, to defer to the statement in Puyallup II, recognizing an Indian right to a net fishery. Therefore, pending an ultimate disposition of this issue by the United States Supreme Court, we will follow Puyallup II and undertake a consideration of the allocation question expressly called for by that case." Majority opinion, 548 P.2d 1058 at 1070	Since the reservation is the first seven miles of the river, and since the federal court does not limit the manner of fishing, this means according to the Ninth Circuit that the Puyallup Tribe could put a fish trap across the river within their reservation and take *all* the fish. The concurring opinion of Justice Rosellini points out that under Judge Boldt as perpetual fishmaster, the following occurred in December, 1975: ". . . the Indians caught 2,476 fish on the Puyallup River, while 1,341 sportsmen fishing by line and hook caught only 102. In Western Washington Green River, 12,000 non-Indians caught only 50 fish, while Indian netters took 4,839. On the Skagit River, 893 sportsmen caught 89 fish while the Indians netted 2,367 fish." 548 P.2d 1058 at 1079.

River because the river runs through the reservation (Att. A).

Thereafter the Puyallup Tribe and the United States sought and obtained from the United States District Court for the Western District of Washington at Tacoma an order on August 13, 1976 enjoining the state of Washington from excluding the hatchery steelhead on the Puyallup River from the treaty commercial fishery (Att. B). The federal court (Judge Boldt) announced that it would retry the same issue between most of the same parties that had been tried for ten days before the Washington Superior Court and affirmed by the Washington Supreme Court in this Case! *Res judicata* is apparently not controlling in the United States District Court for the Western District of Washington. Northwest Steelheaders and Gary Ellis are parties in this case but were denied intervenor status in the federal court case.

When the Puyallup Tribe filed its petition for certiorari in this case on September 23, 1976, they disregarded their representation to Northwest Steelheaders and did not seek review of the exclusion of the hatchery steelhead from the treaty fishery.[1]

Commercial fishermen who were also denied intervenor status by the federal court brought suit in the Washington Supreme Court to assert their rights in

[1] The Puyallup Tribe says in a footnote to its brief that we are too late to raise the issue of exclusion of the hatchery steelhead (Pet. Br. 2). This is not correct for the reasons that will be discussed in the next section. But, if it were correct, our reliance on their representation equitably estops them from making such an argument.

the Washington salmon run. In argument in that case, before the Washington Supreme Court on November 9, 1976 Edmund B. Clark, Chief of Appellate Section, Land and Natural Resources Division of the Department of Justice, appearing on behalf of the United States, *amicus curiae*, argued that the state court should not take jurisdiction because he probably would urge this Court to resolve the basic issues in this case (Att. C). It is our understanding that the Department of Justice in its *amicus curiae* brief to this Court in this case will join the Puyallup Tribe in suggesting that the issues be restricted to regulation of the reservation fishery rather than as suggested by the United States to the Supreme Court of Washington.

This inequitable conduct should not be allowed to succeed.

B. The three basic issues of the remand are fairly comprised within the reservation fishery issue raised in the Petition for Certiorari.

The Puyallup Tribe describes the issue as

> "Whether, consistently with established principles of tribal immunity, a state court may adjudicate on-reservation treaty fishing rights of an Indian tribe and allocate the catch among tribal and non-tribal fishermen." (Pet. Br. 2)

The Puyallup Tribe argues that "usually review here is confined to the questions raised in the petition.

See e.g., *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 428 (1964); *Irvine* v. *California*, 347 U.S. 128, 129 (1954); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 177 (1938)"; (Pet. Br. 38). But all three of these cases were situations in which the petitioners sought to raise additional grounds to reverse the judgment below that were not covered in the original request for certiorari. They have nothing whatsoever to do with our case in which we seek to defend the judgment below upon the very grounds used by the lower court.

In this case, as will be argued in greater detail later, the reservation was sold in 1903 and is now a legal fiction. But even assuming a reservation, the decision of the Supreme Court of Washington to consider the impact of the reservation fishery cannot be meaningfully reviewed without considering the three basic issues.

1. This Court instructed the Washington courts to develop a program of regulating the commercial fishery of the Puyallup Tribe in the interest of conservation. "The aim is to accommodate the rights of Indians under the Treaty and the rights of other people" (*Puyallup II*, 414 U.S. 44, 49).

In the absence of regulation, the Puyallup Tribe could place a fish trap at the mouth of the river, which is in the reservation, and catch every steelhead. In Puyallup II, this Court said:

> "The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets." (414 U.S. 44, 49)

The issue of whether the state should manage the entire steelhead resource of the Puyallup River in the interest of conservation is the other side of the Puyallup Tribe's argument that the state should only manage the portion of the steelhead resource that escapes up stream past the tribal gill nets.

2. Three members of this Court in the concurring opinion in *Puyallup II* said that:

> ". . . the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen." 414 U.S. 44, 49.

If the hatchery planted fish are excluded from the Treaty fishery, then the hatchery fish must be allowed to pass through the reservation as does the water in which they swim. This is the other side of the Puyallup Tribe's argument that they can catch all of the hatchery steelhead because they spend a few weeks of their life cycle swimming through the reservation.

3. This Court in *Puyallup II* instructed the Washington Courts that the steelhead in the Puyallup River "must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing," and

then listed some variables to be considered. 414 U.S. 44, 48, 49.

The Washington Courts in making the apportionment first considered the impact of the Treaty language "in common with all citizens of the territory" and then affirmed the trial court's finding of an equitable apportionment of the natural run. This is the other side of the Puyallup Tribe's argument that the fair apportionment should be all for the tribe and none for the sports fishermen because the steelhead swim through the reservation.

The Puyallup Tribe apparently wants this Court to hear only their side of the argument.[2]

C. This Court can and should consider the three basic issues of the remand even if they are not fairly comprised within the issue raised in the Petition for Certiorari.

Respondents Department of Game of the State of Washington, Northwest Steelheaders Council of Trout Unlimited and Gary Ellis were entirely successful in the Court below on the three issues contained in the remand from this Court and had no right to have the decree on those points reviewed in this Court if petitioners had not sought certiorari. *New York Telephone Co.* v. *Maltbie*, 291 U.S. 545 (1936); *Lindheimer* v. *Illinois Telephone Company*, 292 U.S. 151 (1936).

[2] Even if the Puyallup Tribe is correct, the three basic issues need to be reviewed by this Court to determine the management of the off-reservation fishery.

On the other hand, if there had been adverse findings of fact necessary to the decree or where the lower court granted one claim and denied another, then a party may seek review from the adverse findings or portion of the decree. *Postmar Corp.* v. *Paramount Corp.*, 347 U.S. 89 (1954); *Electric Fittings Corp.* v. *Thomas Betts Co.*, 307 U.S. 241 (1939). This would have to be done by cross appeal or counter petition. *Helvering* v. *Pfeiffer*, 302 U.S. 247 (1937), and would have to be filed within the original 90-day period from the final judgment. 28 U.S.C. § 2101(c). There were no such adverse findings or portions of the decree of the lower court in our case.

In this case, in an abundance of caution, respondents called their briefs which joined in the request for certiorari, "counter petitions." This Court required respondents to rename their briefs "responses", but the same issues remain.

Indeed, respondents can now raise other points in support of the judgment of the Court below that *were not even discussed* by the Court below so long as respondents' rights under the judgment are not enlarged. *United States* v. *American Railway Express Co.*, 265 U.S. 425 (1924); *Langles* v. *Green*, 282 U.S. 53 (1931); *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555 (1931); *Stelos* v. *Hosiery Motor Mend Co.*, 295 U.S. 237 (1935); *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

This Court has on occasion heard and decided issues not presented by either side, such as in *Boynton*

v. *Virginia*, 364 U.S. 454 (1960); *Anderson* v. *United States*, 417 U.S. 211 (1974); *Redup* v. *New York*, 386 U.S. 76 (1967); *NLRB* v. *Lyon Oil Co.*, 352 U.S. 282 (1957).

If respondents can raise new issues to sustain the judgment below or the Court can consider new issues, surely respondents can defend the Supreme Court of Washington on the basic issues which that Court *did decide* in accordance with the remand of this Court.

The Puyallup Tribe now says in its brief that the three issues of the remand cannot be reviewed because they were contained in the briefs erroneously designated "counter-petition" (Pet. Br. 2, 38). This is incorrect for several reasons: (1) these issues are fairly comprised within the issues contained in the petition since they are basic to the decision of the Court below on the reservation question, (2) these issues are properly discussed in the response filed by Northwest Steelheaders Council of Trout Unlimited and Gary Ellis, (3) these issues will sustain the judgment below, and (4) these issues are of such overwhelming importance to the citizens of Washington that they need to be resolved. See letter from members of Washington State Congressional Delegation to the U. S. Department of Justice (Att. D).

The majority opinion of the Washington Supreme Court in this case holds a major portion of its ruling in abeyance, pending review by this Court.

In an even more recent decision, the Washington court almost pleads with this Court to review the

basis of its decision in this case. In *Washington State Commercial Passenger Fishing Vessel Association* v. *Tollefson*, 87 Wash. 2d 417, 553 P.2d 113 (August, 1976), the court says:

> "Another question not considered in the briefs arises from the fact that this court has itself interpreted one of the treaties in question and has arrived at a conclusion as to its meaning which differs from that of the federal court. *Department of Game* v. *Puyallup Tribe, Inc.*, 86 Wn2d 664, 548 P2d 1058 (1976). To which of these interpretations must the state agency respond? The resolution of this question cannot come from this court or from the federal district court, if no definitive authority upon the subject exists. It must come from a higher court whose decisions are binding upon both of us. In short, this dilemma can be resolved only by the Supreme Court of the United States, which, we understand, has been asked to take jurisdiction of the cases involved and settle the question." (87 Wn. 2d 417, 421)

This Court should deal with the fundamental issues and settle the question.

III. The Supreme Court of Washington Should Be Affirmed in Deciding That the State Should Manage the Entire Steelhead Resource of the Puyallup River in the Interest of Conservation

The basic reason why the Supreme Court of Washington decided that the State should manage the entire steelhead resource of the Puyallup River is because this Court told it to do so. In both prior decisions in this case this Court stressed that the fishing of the Puyallup Tribe "may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians". *Puyallup I*, 391 U.S. 392, 398 and, *Puyallup II*, 414 U.S. 44, 48.

The United States Constitution provides in the Tenth Amendment that:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The state of Washington entered the Union in 1889 with every right of the thirteen original states.

Puyallup I as later approved by *Puyallup II*, states:

> "The overriding police power of the State expressed in non-discriminatory measures for conserving fish resources, is preserved." (391 U.S. 392, 398-399 (1968)

Similar decisions were made by this Court in 1876, 1891, 1896, 1905, 1916, 1924, 1942, and 1962. *McCready* v. *Virginia*, 94 U.S. (4 Otto) 391 (1876); *Manchester* v. *Massachusetts*, 139 U.S. 240 (1891); *Ward* v. *Race Horse*, 163 U.S. 504 (1896); *U. S.* v. *Winans*, 198 U.S. 371 (1905); *Kennedy* v. *Becker*, 241 U.S. 556 (1916); *Lacoste* v. *Dept. of Conservation*, 263 U.S. 545 (1924); *Tulee* v. *Washington*, 315 U.S. 681 (1942); *Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962).

The objective mandated by this Court is conservation of the steelhead resource.

Judge Cochran in the first trial in this case (Finding XV) and Judge Brown in the recent trial in this case (Conclusion IX) have held that state regulation of Puyallup Tribe fishing is necessary for conservation.

Here are some of the facts in this record which support the finding:

(A) Ramona Bennett the chairperson of the Tribe testified:

(1) The Tribe has no enforcement officers (R. 78).

(2) The Tribe has no direct reporting of the Indian catch; the only reporting is from the commercial fish buyers (R. 784, 811; App. 81).

(3) The Tribe does not know what the average catch is (R. 798; App. 85-86).

(4) The Tribe does not know how many fish escape to spawn (R. 282; App. 87).

(5) The only evidence of overfishing used by the Tribe is poor catches as reported by its fishermen (R. 767; App. 79).

(6) 1971 tribal fishing regulations were still in effect at the time of trial (May and June 1974) (R. 777; App. 80).

(7) The tribe has waived its regulations when requested by its fishermen (R. 781; App. 80-81).

(8) Every requested Indian fishery has been recognized and approved by the Tribe (R. 782; App. 81).

(9) The Indian fishermen themselves report violations (R. 781; App. 80-81).

10) The Tribe wants to increase its steelhead catch 1,000 each year though they have no studies of future run sizes (R. 788-790; App. 82-83).

(11) The Tribe did continue fishing past the January 17, 1974 closing date set by the Department of Game for fishing by this Tribe (R. 787; App. 82).

(B) Hank Adams, the fisheries management coordinator of the Tribe testified:

(1) He has no courses in fishing management (R. 926; App. 88).

(2) His future plans do not specifically include direct reporting of fish catches by Tribal fishermen (R. 903).

(3) He says the Tribal fishermen "would not necessarily" disregard the escapement and sports catch in determining the amount of their harvest (R. 920; App. 88).

(4) He says that the 1971 Tribal regulations require an official list of fishermen with a registration card, but he has not made up that list because new regulations will be made up (R. 924).

(5) The list of Tribal fishermen furnished by the witness Adams included some names typed in April or May, 1974, and some added in ink during the noon hour recess in his testimony at trial (Pl. Ex. 74-29; R. 947; R. 950; R. 934; App. 89).

(C) James Heckman of the U. S. Fish and Wildlife Service testified:

(1) In 1971 the State Department of Fisheries and his federal agency both recommended that the Tribe reduce the chinook salmon season by two days each week in the interest of conservation and the Tribe only reduced it by one day (R. 1030, 1031; App. 91-92).

(2) In 1973, the State Department of Fisheries recommended a reduction in chinook salmon fishing in the interest of conservation and the Tribe refused (R. 1034; App. 92).

The pattern that emerges is that the commercial tribal fishermen really do what they want to do without any independent control by the Tribe. But self regulation by any commercial group is not adequate to protect a fragile resource.

The Puyallup Tribe is apparently so concerned about the strength of this record on the issue of the need for conservation management by the State that their counsel testifies himself at length beyond the record in their brief in this Court (Pet. Br. 12). Rather than yielding to similar temptation, we need only point out that in December 1976 Judge Brown who tried this case, found it necessary to issue a Temporary Restraining Order and then a Preliminary Injunction against the Puyallup Tribe to stop them from continuing to fish beyond their allocation because they were doing "immediate and irreparable injury to the steelhead resource."

Even if the Puyallup Tribe had adequate regulation in the interest of conservation (which they do not on this record) the threat of multiple management of the same resource remains. This is eloquently discussed by this Court in the treaty fishing case, *Kennedy* v. *Becker*, 241 U.S. 556 (1916), where the Court rejected dual control of the resource by a Tribe and the state, saying:

> "Such a duality of sovereignty, instead of maintaining in each the essential power of preservation, would in fact deny it to both." 241 U.S. 556, 563.

There must be one independent state agency, the Department of Game, with the authority to regulate all steelhead fishing on the Puyallup River.

Fisheries management is a very important science at the University of Washington and 106 schools throughout the country. ROYCE, INTRODUCTION

TO THE FISHERY SCIENCES, Preface I, X (1972). Regulatory decisions must be made by experts exercising great care. A mistaken prediction of escapement needs may show no effect at the time, but result in extinguishing an entire run after two or three life cycles have been completed. CRUTCHFIELD AND PONTECORVO, THE PACIFIC SALMON FISHERIES, A Study of Irrational Conservation, 167. For example, starting in 1880 in Southern California mistaken estimates of escapement needs and overfishing by commercial fishermen virtually eliminated salmon in that area of the state. NETBOY, THE SALMON, THEIR FIGHT FOR SURVIVAL (1974). Run size can change dramatically from year to year as can the amount of water in the river. Conservation requires that certain methods of harvesting fish be avoided regardless of the numbers.

Though predictions can be made ahead of time, a run cannot be accurately estimated until it is about to enter a river and then management decisions have to be made quickly. The Department of Game has 23 staff members with degrees and training in fish biology who can provide the required expertness. (R. 223-224; App. 39)

James Heckman, the expert witness for the Puyallup Tribe in this case also stressed that conservation includes maintenance of the habitat of the specie, which requires adequate water supply, egg incubation areas, food and shelter (R. 677, 678).

The concurring opinion in the Washington Su-

preme Court defines conservation in the same way it was defined by that court in its decision in *Puyallup II:*

> "Conservation means the wise use of the resource, and in the management of steelhead there must be necessary escapement for needed spawning to ensure the perpetuation of the resource. The manner of fishing must be such that it can be controlled so it does not impair or damage the necessary escapement; and further, the manner of fishing itself must not be destructive. 548 P.2d 1058, at 1079 (Cert. Pet. App. B-64) *Cf. Department of Game* v. *Puyallup Tribe*, 80 Wash. 2d 561, 497 P2d 171 (1972).

Federal Judge Boldt on the other hand, limits the definition of conservation to adequate escapement. He has ruled that eleven Washington conservation statutes which apply to all other citizens of the state cannot be enforced against the Puyallup Tribe or any other Treaty fishermen. *U. S.* v. *Washington*, 384 F. Supp. 312, 415. This means that the following conservation needs are now beyond the regulatory power of the State of Washington for rivers other than the Puyallup:

1. Regulating mesh size in salmon fishing which can prevent an incidental catch of the steelhead which are smaller.

2. Regulating the timing of a fishing season which can prevent the depletion of already threatened wild native stock, since they may enter a river at slightly different times than hatchery fish.

3. Preventing underfishing which can damage a run by increasing the competition among the fish for spawning areas.

4. Preventing certain techniques of harvesting fish, such as dynamite charges which cause waste, and the fish wheel, which has the potential of totally eliminating a run on a particular river.

5. Requiring the removal of nets from the water periodically, so that fish will not be wasted.

6. Varying fishing opportunities in different years, since on some runs all fish should escape for spawning, while on other rivers the run is so large that 85% or more can be safely harvested.

7. Preventing all fishing at the mouth of hatcheries when this would deplete the returning run necessary for the continuation of the hatchery program.

VAN CLEVE and JOHNSON, MANAGEMENT OF THE HIGH SEAS FISHERIES OF THE NORTHWESTERN PACIFIC, 17 (1963); ROBINSON AND ROLLINS, MANAGING AQUATIC RESOURCES, OUR CHANGING FISHERIES 136 (1971).

An affirmance in this case would allow the Washington Department of Game and state courts to continue the enforcement of these eleven statutes on the Puyallup River, and might have some influence on Judge Boldt for the other western Washington rivers.

The Puyallup Tribe argues in its brief that the State cannot preserve the steelhead resource because

the Puyallup River flows through the reservation of the Puyallup Tribe.

In the original trial of this case, Judge Cochran found in Finding XII that the Puyallup Indian reservation of 18,000 acres was sold in 1903 pursuant to an Act of Congress with the exception of 22 acres being used as a cemetery. His finding was discussed but not changed by this Court in footnote 1, *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, 394. The finding was set forth by Judge Brown in his Finding I in this case.

After the remand, but before the decision by Judge Brown, the Ninth Circuit decided in *U. S.* v. *Washington*, 496 F.2d 620 (1974), a case in which we were not parties, "that the Puyallup Indian Reservation continues to exist," without further definition of what was intended. This Court denied certiorari, 419 U.S. 1032 (1974).

The implications of this decision stagger the imagination. Much of the "reservation" is now the City of Tacoma, Washington. Sports fishermen continue to fish for steelhead from the banks or in small boats within the "reservation" (R. 811). The State owns the bed and shores of the Puyallup River up to ordinary high water. Article XVII, Constitution of Washington. If the reservation "still exists," must the Puyallup Tribe repurchase the land at present market value from those to whom it was sold in 1903 and who have long thought that they had quiet title? Alternatively, can tribal members trespass on what the purchasers

assumed to be their own property? Must Puyallup Tribe members obey traffic signals in the City of Tacoma since the Ninth Circuit says the reservation "continues to exist"?

There is on file with this Court the *amicus curiae* brief of the National Tribal Chairmen urging the integrity of reservation land. A major problem with their argument is that in this case there is no reservation land. Nor are we dealing with a lake enclosed within a reservation or a fishing stream with a resident population of fish.

Natural steelhead spawn upstream on the Puyallup River. In addition, the Department of Game places hatchery steelhead smolt (one year old steelhead) upstream on the Puyallup River. Natural steelhead migrate to the ocean after two years of life; hatchery steelhead after one year. The migration takes about a week, so they are within the Ninth Circuit's "reservation" for less than a week. They then live in the ocean for several years before making their journey back to Commencement Bay and the Puyallup River. (R. 104, 108, 142; App. 23, 24). Though no one knows exactly how long it takes a steelhead to swim upstream on the Puyallup River, a steelhead actively migrating could swim seven miles in a day or two. FALTER and RINGE, THE POLLUTION EFFECTS ON ADULT STEELHEAD MIGRATION IN THE SNAKE RIVER, Environmental Protection Agency - 660/3 - 73-017 (Feb. 1974). Does this couple of weeks swimming through the reservation as part of their four or five year life cycle outside of the reser-

vation mean that all these anadromous fish are the exclusive property of the Puyallup Tribe?

The Puyallup Tribe brief justifies this unusual result by citing cases giving tribes exclusive control over reservation activities such as adoptions. See for example, *Fisher* v. *District Court*, 424 U.S. 382 (1976) (Pet. Br. p. 21).

The concurring opinion below of Chief Justice Stafford after discussing similar cases, distinguishes them in this way:

> "On the other hand, it is only logical to assume the Supreme Court is equally aware of the above cited cases and had them in mind when the following broad language was used in *Puyallup II* at page 49:
>
> > The aim is to accommodate the rights of Indians under the Treaty and the right of other people.
> >
> > We do not imply that these fishing rights persist down to the very last steelhead in the river. *Rights can be controlled by the need to conserve a species;* and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. *The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.* (Italics mine.)
>
> "When one considers the fragile nature of the fishery involved, as well as the State's physical and financial support of that resource, it is easy to understand the above quoted language. If the Supreme Court has not recognized the existence of a State power to control and supervise the mandated allocation, the Supreme Court's direction would, for all practical purposes, be impossible to establish, implement, and enforce. Without question the Supreme Court did not intend to direct the State of Washington to perform a useless act." *(Department of Game* v. *Puyallup Tribe, Inc.*, 548 P.2d 1058, 1075 (Cert. Pet. App. B. 47-48).

The concurring opinion of Justice Rosellini also adds that if they was any intention in the treaty with the Puyallups of giving them exclusive control over the reservation fishery this could have been stated. He points out that:

> "A treaty signed in June 1855 in Walla-Walla Valley between the United States and the Walla-Walla Tribe, 12 Stat. 945, 946, illustrates that the Indians and United States were capable of using explicit language when it was desired to give exclusive rights to Indians to fish. Article 1 of the treaty says
>
> > [t]hat *the exclusive right of taking fish in the streams running through and bordering said reservation* is hereby secured to said Indians, and at all other usual and accustomed stations in common with citizens of the United States, and of erecting suitable buildings for curing the same; the privilege of hunting, gathering roots and berries and pas-

turing their stock on unclaimed lands in common with citizens, is also secured to them. [emphasis added]

"It can be seen that in the Walla-Walla Treaty, the Indians reserved the exclusive right to take fish from streams running through and bordering said reservation and outside their reservation in common with the citizens of the United States. There was no difficulty in selecting the words to convey the separate ideas of 'exclusive rights' and 'rights secured in common' with the citizens of the United States." (548 P.2d 1058, 1076-77) (Cert. Pet. App. B. 54-55).

In *Antoine* v. *Washington*, 420 U.S. 194, 95 S. Ct. 944, 43 L. Ed. 2d 129 (1975), reservation land of the Colville Tribe had been ceded to the United States with an agreement that retained Indian hunting rights. This Court reversed the convictions of two Colville Indians who hunted on that land in violation of state law. Both the majority and the concurring opinions cited the *Puyallup* cases as allowing state regulation in the interest of conservation. But then Justice Douglas points out in the concurring opinion that:

"In any event no conservation interest has been tendered here. The record in this case is devoid of any finding as to conservation needs or conservation methods." (95 S. Ct. 944, 954).

Our case similarly deals with reservation land that has been sold, and the Ninth Circuit has ambiguously held that the reservation "continues to exist." But in our case, unlike *Antoine*, the record has been made of

the conservation necessity for state management of the resource.

In *U. S.* v. *Washington*, 384 F. Supp. 312 (W.D. Wash., 1974) Judge Boldt first said that the reservation fishery could not be regulated. On October 21, 1975, after the Ninth Circuit affirmance, but as part of his continuing jurisdiction, he issued Finding of Fact 285 and Conclusion of Law 68 as follows.

"No. 285. The on-reservation fisheries of the Puyallup and Nisqually Tribes for pink and chinook salmon involve runs which are subject to the decrees of this court in this case because they are the subject of treaty provisions securing to these and other Indian tribes the right of taking fish at off-reservation locations in common with others. Thus, on-reservation and off-reservation fisheries on these runs are interrelated and the preservation of such runs can be affected by the extent of both on and off reservation fishing on them."

"No. 68. This Court has jurisdiction over the Puyallup and Nisqually Tribes and jurisdiction in this case to order them to curtail or terminate their fisheries within the exterior boundaries of their reservations on runs of fish affected by this Court's decrees when necessary for the effectuation of the decrees or the preservation of such runs."

The Puyallup and Nisqually Tribes have appealed this salmon ruling of Judge Boldt's to the Ninth Circuit. So even Judge Boldt now finally recognizes the interrelation of the on-reservation and off-reservation fishery.

It needs to be remembered that this Court in the earlier decisions in this case said that the entire steelhead resource on the Puyallup River should be managed in the interest of conservation by the State of Washington.

IV. The Supreme Court of Washington Should Be Affirmed in Deciding That the Hatchery Propagated Steelhead on the Puyallup River which Are Paid for with the License Fees and Tags of Sports Fishermen Should Be Excluded from the Commercial Fishery of the Puyallup Tribe

Mr. Justice White in the concurring opinion in *Puyallup II* has stated:

> "On the other hand, the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen." (414 U.S. 44, 49).

Mr. Justice Douglas writing for the majority, does not disagree with the concurring opinion. He says:

> "We know from the record and oral arguments that the present run of steelhead trout is made possible by the planting of young steelhead trout called smolt and that the planting program is financed in large part by the license fees paid by the sports fishermen." (414 U.S. 44, 47).

The case was remanded to develop a fuller record with the clear implication that hatchery fish are outside of the Treaty. Mr. Justice Douglas quoted counsel for the Department of Game ". . . that approximately 80% of the cost of that program was financed by

sports fishermen." 414 U.S. 44, 48. Actually the record as now developed on remand shows that all of the steelhead trout planted in the Puyallup River come from the Washington State South Tacoma hatchery on Chambers Creek which is financed 100% from state funds derived from users (R. 140, 162; App. 27, 33).

In 1933 the State of Washington established the Game Fund to be financed by user fees. RCW 77.12.-170. This earmarking of user funds to develop a recreational resource which specially benefitted the users, but also provided incidental benefit to all citizens of the state, became the pattern around the country, *Annual Report, Federal Aid in Fish and Wildlife Restoration,* Wildlife Management Institute and the Sports Fishing Institute, Washington, D. C. (1973).

Most Washingtonians love the outdoors and over the years the license fees and tags of millions of sportsmen have gone into the Game Fund. The Puyallup Tribe suggests that steelheaders account for 10% of the entire game fund (Pet. Br. 14). The Department of Game has many hunting and fishing programs. The steelhead sports fishermen almost completely finance the state's steelhead program (R. 143, 240; App. 29, 40). In 1972-73, the Department of Game expended a total of $1.6 million on its steelhead program (R. 143; App. 29), and received a total of $1.25 million from the steelhead fishermen from the sale of licenses and punch cards (R. 240; App. 40). Furthermore, the angler who fishes for

rainbow trout on Washington lakes may also fish for steelhead trout on Washington rivers (R. 595). There may be a different emphasis on the way the dollars are spent in a different year but the money still comes from the Game fund (R. 98).

Though no federal money has gone into the construction or operation of the South Tacoma hatchery (R. 140; App. 27-28), on a statewide basis there has been a small federal contribution to the Washington program only within the last decade (R. 146; App. 31). The Dingell-Johnson federal matching funds are also user money derived from a sales tax on fishing tackle and redistributed by the federal government (R. 448; App. 60-61) (84 Stat. 1101 (1970)). The general taxpayers do contribute to the Anadromous Fish Act funds which are matched by the states on a 50-50 basis (88 Stat. 398 (1974)). The federal contribution in Washington from this fund has been 1% to 2% of the budget of the Department of Game (Pl. Ex. 74-4); R. 160; R. 162).

Counsel for Ramona Bennett argued at trial that there is a "pervasive impact of federal funding" which should determine how this Court should rule.

Amendment X to the United States Constitution, a part of our Bill of Rights, provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by law to the States, are reserved to the States respectively, or to the people."

In cases such as *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405 (1973), this Court has made clear that even a substantial federal contribution of money, there social security payments, does not allow the federal government to take away the right of the state to run its own program. The states were reserved considerable police power over their territories since state governments can exercise control more advantageously than the national government. *Gibbons* v. *Ogden*, 9 Wheat 1, 6 L. Ed. 23, 72 (1824). Furthermore, courts should not find federal preemption over state regulation unless there is clear and manifest congressional intent because the states are powerless to remove the ill-effects of such a decision and Congress remains free to make clear its intentions. *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261 (1942). More recently this Court has held that federal district courts should not sit in review over decisions of state courts in criminal cases. *United States* v. *Janis*, — U.S. —, 96 S. Ct. 3021, — L. Ed. 2d — (1976).

The federal government has the right to place conditions on its grant of money to a state, and the state can then choose whether to accept or reject the gift after examining the strings that are attached. But suppose the strings only appear after the package is unwrapped and the contents used? No one told the state of Washington that if it accepted 1% to 2% of its Game Department budget from matching Anadromous Fish Act funds that this meant federal control.

Can a user group, such as sports fishermen, create a treasured recreational resource with their own money without having that treasure taken away by others? If the hatchery fish spent their entire life in wholly owned ponds, it is unquestioned that no one else could legally deplete the supply. *Arkansas Game and Fish Commission* v. *Storthz*, 181 Ark. 1089, 29 S.W. 2d 294 (1930); *Murphy* v. *Hitchcock*, 22 Hawaii 665 (1915); *Camp Clearwater, Inc.* v. *Plock*, 52 N.J. Super. 583, 146 A.2d 527 (1958), aff'd 157 A.2d 15 (1959), Annot. 57 A.L.R.2d 569, 587. There is no reason why the right to these artificially propagated hatchery plants cannot be maintained when they are released in a public river. An analogy might be found in grazing law. The ownership of cattle remains in its owner no matter which land is used by the cattle for grazing. *Arkansas Cattle Co.* v. *Mann*, 130 U.S. 69 (1889).

There are other areas of law where a landowner may not own what crosses his land. In Washington, the water in an artificial ditch is the personal property of the ditch builder and the landowners around the ditch have no riparian water rights and must give it safe passage through their land. *Methow Cattle Co.* v. *Williams*, 64 Wash. 457, 117 P. 239 (1911); *Madison* v. *McNeal*, 171 Wash. 669, 19 P.2d 97 (1933). If hatchery steelhead are not the property of the Treaty Indians they must be allowed to pass through the reservation uncaught.

The Supreme Court of Washington held that the

undisputed evidence in the trial record is that hatchery steelhead were unknown to the signers of the 1855 Treaty of Medicine Creek and were, therefore, not intended to be included within the Treaty. It must be remembered that the evidence in this case includes all the basic anthropological findings and records that were developed in the companion case of *U. S.* v. *Washington*. The *amicus curiae* Colville and other tribes seek to change the record on this case by arguing that hatcheries were established in Germany in 1863, France in 1852 and New York in 1864. (Am. Cur. Br., 30). Even if this were in the record, it has nothing to do with what was intended at Medicine Creek in the Pacific Northwest in 1855.

The Washington Supreme Court also says:

> "This result, which excludes hatchery bred fish from the Treaty right, is further supported by consideration of equity. The evidence below demonstrated that the steelhead program conducted by the State Department of Game is nearly totally funded by the citizens of the state, primarily via license and other user fees.[3] It would be manifestly unfair to give one group of citizens a superior opportunity to enjoy a resource thusly provided while denying other citizens, who provide the necessary funding, equal treatment. To allow the Indians to take hatchery fish by the use of nets would be to subsidize them to the extent that other state citizens are paying for the hatchery program, while being limited solely to the much less effective hook-and-line method of fishing. The Indian Treaty does not demand such a

subsidy. *See Puyallup II* at 49 (White, J. concurring)."

The Court adds in a footnote that:

"It is our opinion, furthermore, that even if the State Department of Game's programs were totally federally funded, the Indians absent specific conditions on such federal financing would enjoy only those rights available to all state citizens to the resources this provided." (Cert. Pet. App. B. 36, 37)

The Puyallup Tribe argued below that they are entitled to the hatchery fish because of the depletion of the natural run by the State of Washington. The Washington Supreme Court answers this argument by noting:

". . . Furthermore, the record does not demonstrate that the run has been depleted, but instead establishes that the artificially propagated run in fact augments the natural run since a hatchery bred steelhead loses its distinguishing characteristics upon returning to its native stream and henceforth is classified as a natural run steelhead." (Cert. Pet. App. B. 34, 35).

Furthermore, past steelhead runs on the Puyallup River have been damaged by the United States Government building dams and diking portions of the river (R. 728-729; App. 75, 77). The Puyallup Tribe's overfishing has threatened the runs. Indeed, the only group that has not damaged the runs are the sports fishermen, represented in this brief.

At trial, the Puyallup Tribe conceded that it had

no evidence of the size of the steelhead run in 1855 or have any way of allocating damage to past runs to any particular cause (R. 686, 688; App. 71, 72). The trial court allowed limited testimony (R. 726-731; App. 74-77), but basically excluded the opinions of the Tribe's expert witness as being too speculative (R. 689; App. 72-73).

The Puyallup Tribe argues that there are "intensely practical" reasons to let federal Judge Boldt retry the issue of the exclusion of hatchery fish (Pet. Br. 39). The "intensely practical" reasons are that they lost in this case and want a second chance.

Amicus curiae Colville Tribe et al are concerned that this case might set a precedent for Judge Boldt's later trial. We hope it will. Judge Boldt has already disregarded the *res judicata* effect of the decision of the Supreme Court of Washington in this case and proposes to allow the Puyallup Tribe to retry in 1978 the same issue against the same principal defendant. If this Court affirms, thereby excluding the hatchery fish from the Treaty fishery, we hope that Judge Boldt will give some weight to the decision.

This Court asked for a record to be developed on hatchery steelhead in its remand in this case. A full record is now available for review. The concurring opinion in *Puyallup II* can and should now be accepted by the majority.

V. The Supreme Court of Washington Should Be Affirmed in Deciding That the Treaty Language "In Common with All Citizens of the Territory" Reserves to the Puyallup Tribe An Equitable Share of the Natural Run of Steelhead on the Puyallup River

The Washington Supreme Court starts out by construing the words in the Treaty of Medicine Creek "in common with all citizens of the territory" which are the measure of the Tribal right. Judge Boldt in *U. S.* v. *Washington*, 384 F. Supp. 312, said that these words meant 50-50. He then developed a seven element definition of what he called the principle of "sharing equally." 384 F. Supp. 312, 343. The concurring opinion of the Washington Supreme Court in our case has pointed out that under the Judge Boldt formula, the following occurred in December, 1975:

> ". . . the Indians caught 2,476 fish on the Puyallup River, while 1,341 sportsmen fishing by line and hook caught only 102. In Western Washington Green River, 12,000 non-Indians caught only 50 fish, while Indian netters took 3,839. On the Skagit River, 893 sportsmen caught 89 fish while the Indians netted 2,367 fish." 548 P.2d 1058 at 1079 (Cert. Pet. App. B. 664).[3]

The Washington Supreme Court differed from Judge Boldt's interpretation of the treaty language "in common." It basically held that the words "in

[3] This is because the hook and line sportsmen steelhead fishery is upstream and behind the Indian gill nets at the mouths of the rivers. The figures would be different for salmon where the non-Indian fishery, primarily commercial, is in the ocean ahead of the Indian nets.

common" meant an equal opportunity with other citizens, and that the Puyallup Tribe is not entitled to any specific number of fish. The Washington Supreme Court asks this Court to rethink its mandate in *Puyallup II* that there be a specific allocation. But if *Puyallup II* is to remain good law, it then turns to the allocation.

This Court in *Puyallup II* discussed some of the factors to be considered by the Washington Courts in making the allocation of Puyallup River steelhead:

> "Only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species. If hook and line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned. What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook and line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing and the like." *Puyallup II*, 414 U.S. 44, 48, 49.

Judge Brown at trial considered the factors and then determined that 45% of the natural steelhead

run was a fair allocation for the small number of Puyallup Tribal fishermen. The Washington Supreme Court affirmed his decision and this Court should agree.

The Puyallup Tribe, on the other hand, argues that it is entitled to an allocation of all of the steelhead because they swim through the "reservation." Such an allocation does not comply with the instruction of this Court in *Puyallup II* "to accommodate the rights of Indians under the Treaty and the rights of other people." 414 U.S. 44, 49.

CONCLUSION

This case not only deals with justice for the Puyallup Tribe and the sports fishermen; it also requires a definition of responsibility within the federal system. The basic thrust of petitioners' argument here and in the related federal court litigation is that the state of Washington cannot be trusted to protect Indian Treaty rights. The suggested solution is to turn over management of the anadromous fishery to the federal government.

Northwest Steelheaders Council of Trout Unlimited and Gary Ellis want the Puyallup Tribe to have every right guaranteed in the Treaty of Medicine Creek. The Puyallup fishermen are entitled to a fair opportunity of catching natural run steelhead with gill nets on the Puyallup River since the small steelhead catch is part of their tribal way of earning their livelihood.

But, we the sports fishermen, are the "other people" that this Court in *Puyallup II* said had "rights." Our rights include the hatchery steelhead that we have paid for with our earmarked license fees and tags which augment the natural run. Since 5,171 of us fish the Puyallup River compared to 20 Puyallup Tribe families, we, too, are entitled to a fair opportunity to catch natural run steelhead.

The Puyallup Tribe and the sports fishermen have an identical interest in seeking to have state and federal government replenish damaged runs. That com-

mon ground can be found is shown by the pending Tribal approved settlement of the Columbia River controversy, which entirely removes steelhead as a "target fish" from the Treaty Indian fishery. (Citation to the Oregon Federal Court case not available).

The Puyallups and other Treaty Indian tribes have been reluctant to accept state management of the resource because of past state unfairness. But the solution is neither to establish a federal judge as perpetual fishmaster, as is now occurring for other western Washington rivers, nor to have management decisions made by user groups.

The solution which will most benefit present and future fishermen is unified, expert, independent state management of the resource that protects the rights of all.

The decision of the Supreme Court of Washington should be affirmed so that good conservation can be good law.

Respectfully submitted,

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Trout Unlimited and Gary Ellis

ATTACHMENT A

AFFIDAVIT
OF DON S. WILLNER IN SUPPORT OF
MOTION FOR EXTENSION OF TIME

STATE OF OREGON)
) ss
COUNTY OF MULTNOMAH)

I, DON S. WILLNER, being first duly sworn, depose and say:

I am the attorney for Northwest Steelheaders Council of Trout Unlimited and Gary Ellis, respondents and counter-petitioners herein. The decision of the Washington Supreme Court basically held that:

(1) The state of Washington had the right to regulate the entire steelhead fishery on the Puyallup River in the interest of conservation.

(2) The artificially propagated hatchery steelhead should be excluded from the treaty fishery of the Puyallup Tribe.

(3) The allocation of natural run steelhead made by the trial court between the Puyallup Tribe, commercial gill net fishermen and the sports fishermen was affirmed.

This case was decided by the superior and supreme courts of Washington upon remand from this Court. The decision is directly contrary to the decision of the Ninth Circuit in *United States* v. *Washington*, 520 F.2d 677 (9th Cir. 1975), cert. den. 96 S. Ct. 877.

This conflict which is the basis for the petition and counter-petitions for certiorari, raises a fundamental issue of the relationship of state and federal government, and is the single controversy of most widespread public concern in the state of Washington.

After the decision of the Washington Supreme Court the Puyallup Tribe and others went to the United States District Court for the Western District of Washington and in a case in which my clients were denied the right to intervene obtained an injunction against the Washington Department of Game excluding the hatchery steelhead from the treaty fishery.

On several occasions between June 25, 1976 and September 22, 1976 I talked to John Clinebell and William Rodgers, attorneys for the Puyallup Tribe, and either or both assured me that they would petition for certiorari in this case, and their petition would raise both the right of the state to regulate the steelhead fishery on the entire river and the exclusion of the hatchery steelhead from the treaty fishery. Relying on this assurance I did not file a petition for certiorari by September 23, 1976. It was only thereafter when I received their petition for certiorari that I learned for the first time that the Puyallup Tribe was seeking to have this Court review only a portion of the decision of the Supreme Court of Washington.

I had planned to respond to the petition by urging this Court to grant certiorari. With the Puyallup Tribe having sought certiorari on only one issue, con-

trary to the previous assurance to me, it became necessary for me to file a response and counter-petition. This document in proper form, Exhibit A, was tendered to the Clerk of the Supreme Court on October 22, 1976 and was not accepted for filing. (The Clerk did grant a two-week extension for reprinting the document and calling it a Response.)

The document should be filed in its present form as both a Response and Counter-Petition because of the importance of the issues raised by the counter-petition and the circumstances set forth in this affidavit.

The requirements of Rule 22 (4) are included in Exhibit A attached hereto. The judgment sought to be reviewed is attached as Exhibit B.

/s/ *Don S. Willner*

DON S. WILLNER

SUBSCRIBED AND SWORN to before me this 26 day of October, 1976.

/s/ *Audrey Ansell*

Notary Public for Oregon

My commission expires: 1/26/78

ATTACHMENT B

IN THE SUPREME COURT
of the
STATE OF WASHINGTON

PUGET SOUND GILLNETTERS ASSOCIATION) a non-profit Washington corporation;) PHILIP SUTHERLAND,)
Petitioners,)
v.) No. 44401
)
DONALD MOOS, Director, Washington) State Department of Fisheries; STATE) OF WASHINGTON, DEPARTMENT OF) FISHERIES,)
Respondent.)

STATE OF WASHINGTON,)
) ss.
COUNTY OF THURSTON.)

I, JOHN J. CHAMPAGNE, Clerk of the Supreme Court of the State of Washington, do hereby certify that the attached and foregoing is a full, true and correct transcription of a portion of the argument presented by Edmund Clark, United States Department of Justice, on November 9, 1976 in the above entitled cause and now appears of record and on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 16th day of February, 1977.
(SEAL)

by REGINALD W. SHIVER, Deputy
JOHN J. CHAMPAGNE,
Clerk of the Supreme Court
State of Washington

Q. Council, I hate to still pursue the question of using your good offices to get the Supreme Court to take jurisdiction because you see in past events we've had some violence and some . . .

A. Off the record I strongly suspect that I will recommend that the Supreme Court take the case. I have not so done yet.

ATTACHMENT C

DON BONKER
Third Congressional District
State of Washington

CONGRESS OF THE UNITED STATES
House of Representatives
Washington, D. C. 20515
February 11, 1977

Honorable Griffin Bell
United States Attorney General
Washington, D. C.

Dear Mr. Attorney General:

The Indian fishing rights controversy in the State of Washington remains in something of a legal fog. Opportunity is now at hand for the United States Supreme Court to finally resolve the legal uncertainty. While we take no position on the merits of the issues, their authoritative resolution by the Supreme Court would benefit all parties.

In several different cases, Federal District Courts and the Ninth Circuit Court of Appeals have rendered opinions at variance with opinions of the Supreme Court of Washington on these basic issues:

1. Limitations on the right of the state of Washington to manage the resource in the interest of conservation.

2. The exclusion of hatchery-propagated fish from the treaty fishery.

3. The interpretation of the treaty language "in common," which results in the allocation of fish to various user groups.

The United States Supreme Court recently granted certiorari in the case of *Department of Game* v. *Puyallup Tribe, Inc.* We feel this case is a vehicle for resolution by the United States Supreme Court of these basic issues. Without stating any opinion on the merits, and certainly without urging any posture upon the Department of Justice, we do urgently request the Department seek in its *amicus* brief to present the issues to the court.

Sincerely,

Warren G. Magnuson, U.S.S.
Don Bonker, M.C.
Norman D. Dicks, M.C.

Henry M. Jackson, U.S.S.
Lloyd Meeds, M.C.
Joel Pritchard, M.C.

ATTACHMENT D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al, Plaintiffs,	)	Civil No. 9213
vs.	)	
STATE OF WASHINGTON, et al, Defendants.	)	ORDER GRANTING PRELIMINARY INJUNCTION

Dr. Whitney, Technical Advisor to the Court, advises that it is highly desirable for all concerned that the Court's decision on the Motion for a Preliminary Injunction be determined prior to August 15, 1976.

The Court has fully considered all of the issues, contentions and Proposed Findings of Fact and Conclusions of Law submitted by the parties pertaining to the so-called "hatchery issues."

Typing of the Findings of Fact, Conclusions of Law and rulings of the Court on all issues is in progress and will be completed, filed for entry with the Clerk and distributed to counsel for all parties, Monday, 8/16/76.

For the reason above stated, the Court hereby holds, finds and orders that the Temporary Restraining Order, entered 7/14/76 and by agreement of all parties continued in effect until further order of the court, be hereby replaced by a Preliminary Injunction providing as follows:

Federal Court Injunction (8/13/76)

The Defendant State of Washington, including its Directors of Fisheries and Game, and all other officers, employees, agents and attorneys of each are restrained and enjoined from basing the determination of numbers of harvestable fish which Treaty Indians shall have the opportunity to take pursuant to this Court's previous decisions, on anything other than the total estimated runs of free-swimming fish, including those resulting from hatchery or other artificial propagation or transplanting programs. This order applies to the entire case area, each of the tribes, and all of the waters within the case area.

This injunction shall continue in effect until further order of the Court after entry of final determination in Phase II.

IT IS SO ORDERED this 13th day of August, 1976.

/s/ *George H. Boldt*
GEORGE H. BOLDT
Sr. United States
District Judge

Supreme Court, U. S.
FILED
FEB 28 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976

No. 76-423

PUYALLUP TRIBE, INC.,
AND
RAMONA BENNETT,
Petitioners,

v.

DEPARTMENT OF GAME OF
THE STATE OF WASHINGTON,
Respondent.

BRIEF OF RESPONDENT DEPARTMENT OF GAME OF THE STATE OF WASHINGTON

SLADE GORTON,
Attorney General,

EDWARD B. MACKIE,
Deputy Attorney General,
Attorneys for Respondent.

Office & Post Office Address:
Temple of Justice, Olympia, Washington 98504, (206) 753-6207

STATE PRINTING PLANT OLYMPIA, WASHINGTON

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IN THE

SUPREME COURT

OF THE

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OCTOBER TERM, 1976

No. 76-423

PUYALLUP TRIBE, INC.,
AND
RAMONA BENNETT,
Petitioners,

v.

DEPARTMENT OF GAME OF
THE STATE OF WASHINGTON,
Respondent.

BRIEF OF RESPONDENT DEPARTMENT OF GAME OF THE STATE OF WASHINGTON

OPINION BELOW

The opinions of the Supreme Court of the State of Washington (*Dept. of Game, et al. v. Puyallup Tribe, Inc.*,[1] 86 Wn. 2d 664, 548 P. 2d 1058 (1976)) and the trial court, the Superior Court of Pierce County, are set forth in Appendices B-E of the petitioners' Petition for a Writ of Certiorari. This court

[1]Hereinafter referred to as *Puyallup III*, 86 Wn. 2d 664.

has on two prior occasions rendered decisions in this case; *Puyallup Tribe v. Dept. of Game of Washington*,[2] 391 U.S. 392 (1968), and *Dept. of Game of Washington v. Puyallup Tribe*,[3] 414 U.S. 44 (1973). The prior decisions of the Washington Supreme Court in this same case are *Dept. of Game, et al. v. Puyallup Tribe*,[4] 70 Wn. 2d 245, 422 P. 2d 254 (1967), and *Dept. of Game v. Puyallup Tribe*,[5] 80 Wn. 2d 561, 497 P. 2d 171 (1972).

QUESTION PRESENTED

Whether a state court in allocating the harvestable catch of steelhead between tribal and nontribal fishermen pursuant to the remand directions of this court can judicially enforce that division.[6]

STATEMENT OF THE CASE

A. Nature of Proceedings

This Court in 1973 (*Puyallup II*, 414 U.S. 44) reversed a decision of the Washington State Supreme Court (*Puyallup II*, 80 Wn. 2d 561, 497 P. 2d 171) as it related to the steelhead fishery and remanded for further proceedings. This Court expressed two concerns:

> (1) "If hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sport fishing so far as that particular species is concerned. What formula should be employed is not for us to propose. There are many variables — * * *" (414 U.S., *supra*, at 48.)
>
> (2) Whether hatchery fish are excluded from the treaty apportionment. A majority of the Court specifically reserved ruling on this issue, but Chief Justice Burger and Justices White and Stewart in a concurring opinion stated that the State of Washington is not obligated to subsidize the Indian fishing with planted fish paid for by sports fishermen. (*Supra*, at 49.)

[2]Hereinafter referred to as *Puyallup I*. 391 U.S. 392.
[3]Hereinafter referred to as *Puyallup II*, 414 U.S. 44.
[4]Hereinafter referred to as *Puyallup I*, 70 Wn. 2d 245.
[5]Hereinafter referred to as *Puyallup II*, 80 Wn. 2d 561.
[6]Petitioners have not challenged the state court determination that (a) the treaty entitlement under the Treaty of Medicine Creek, 10 Stat. 1132 (1854), does not include hatchery propagated steelhead, and (b) that the treaty share of the harvestable natural run of steelhead for the Indian fishermen is 45%. The petitioners here challenged the enforceability of the decree with reference to fishing activities which occur within the "Puyallup Reservation."

The State court, pursuant to the remand directions of this Court, after a full trial, concluded that hatchery fish are not included within the treaty entitlement and thus are not subject to a special apportionment between treaty and nontreaty fishermen, which nontreaty fishermen are restricted to a hook-and-line fishery.

Petitioners challenge the State court's power to enforce the decree rather than the correctness of its resolution of the issues remanded by this Court. The petitioners rely on their assertion that a Puyallup Reservation exists and their conclusion that the State court thus cannot enforce its judgment with respect to activities which occur within the boundaries of the asserted reservation. While the "reservation" question will be discussed, it must be emphasized at the outset that the Indian fishery here in question ex-

tends beyond the boundary of the "reservation." The testimony of the tribal chairperson clearly establishes that Puyallup Indians do fish beyond the boundaries of the reservation. (App. 35) Thus, this case clearly continues to involve, as it has for the last fourteen years, an off-reservation fishery. Regardless of the disposition of the petitioners' question, the State court decree should be affirmed as it affects unquestioned off-reservation fishing.

B. **Statement of Position**

The petitioners' jurisdictional contention cannot be considered without reference to and discussion of the State court's resolution of the issues presented upon remand from this Court. The State court has concluded:

(1) That hatchery fish are not included within the treaty right and therefore are not subject to a special apportionment. This conclusion has a direct relationship to the "jurisdictional" question.

(2) That the Indians are entitled to an allocation of 45% of the harvestable natural fish, which means that the remaining 55% of the harvestable natural steelhead are not subject to the treaty rights. This also has a direct relationship to the "jurisdictional" question.

The petitioners' jurisdictional contention relies upon *U.S. v. Washington*, 496 F. 2d 620 (9th Cir. 1974), cert. den. 419 U.S. 1032 (1974), in which the district court conclusion that the Puyallup Reservation had been terminated was reversed, and the case

remanded. No action has been taken on the remand, and thus no definitive resolution has been made of the questions raised in that litigation. The determination made in *Puyallup I*, 70 Wn. 2d 245, 422 P. 2d 754 (1967), that the Puyallup Reservation had been terminated, has never been reversed.[7] Further, this Court's recent decision in *De Coteau v. District County Court*, 420 U.S. 425 (1975), rendered after the Ninth Circuit decision, fully supports the conclusion that the Puyallup Reservation was in fact terminated.

The Washington Supreme Court explicitly recognized that in *Puyallup II*, *supra*,

> "we overstated our case by indicating that an Indian net fishery was a matter of right under the treaty." (Puyallup III, 86 Wn. 2d, *supra*, at 671)

which well may have misled this Court in its decision in *Puyallup II*, 414 U.S. 44. We are therefore presenting the arguments expressed in the opinion of the Washington State Supreme Court calling for reexamination of the allocation requirements of *Puyallup II*.

HISTORY OF THE PROCEEDING

In 1963 the Washington State Game Department and the Department of Fisheries commenced

[7]We recognize that in another proceeding, *Satiacum v. Washington*, 414 U.S. 1 (1973), this Court found that if Satiacum had been fishing outside the boundaries of what was or is the Puyallup Reservation, then the State court in *State v. Satiacum*, 80 Wn. 2d 492, 495 P. 2d 1035 (1972), had unnecessarily addressed and determined the federal question of whether the reservation had "ceased to exist." This Court did not state that the State court could not consider the question, but rather that it had unnecessarily done so in that proceeding.

this action, requesting a declaratory judgment seeking to determine what rights, privileges or immunities individuals who purported to be members of the Puyallup tribe possessed with reference to the exercise of the state's laws regulating fishing in the Puyallup River and adjacent waters. The pertinent provision of the Treaty of Medicine Creek (December 26, 1854), (10 Stat. 1132) is Article III, which provides:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however*, That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter."

In August, 1965, the trial court concluded that neither the Puyallup Tribe, nor a Puyallup Reservation, existed and thus there were no treaty rights for individuals who were members of the Puyallup organization. The State Supreme Court decided in *Puyallup I*, 70 Wn. 2d 245 (1967), that the trial court lacked jurisdiction to consider whether the tribe existed. The Court concluded that although the Puyallup Reservation no longer existed, the Puyallup Indians have a treaty right to fish at usual and accustomed grounds. Those rights were not absolute but were subject to the state's exercise of police

power provided the state's regulations were reasonable and necessary for conservation. The court further concluded that the state had sustained its burden in establishing that the continued use of set and drift nets would result in the nearly complete destruction of fish runs in the Puyallup River. (*Supra*, at 261)

This Court took jurisdiction in *Puyallup I*, 391 U.S. 392 (1968), and concluded that the Indian treaty fishing rights are subject to the state's exercise of its police power, noting, *supra*, at 398, that the manner of fishing, the size of the take, the restriction of commercial fishing and the like may be regulated by the state in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians. This Court indicated the standard for exercising state power with respect to Indian treaty fishing rights was whether the regulations were reasonable and necessary for conservation. The proceeding was remanded to make ultimate findings on the conservation issue with the further direction that those findings should also cover the issue of equal protection implicit in the phrase "in common with." (*Puyallup I, supra*, at 403)

The remand proceeding, commonly referred to as *Puyallup II*, commenced before Pierce County Superior Court in August, 1970. In the remand proceeding, the Department of Fisheries and the Department of Game took different legal positions. The Department of Fisheries construed this Court's de-

cision in *Puyallup I*, 391 U.S. 401, to mean that the Indians had a greater right to participate in the off-reservation fishery than other citizens of the state. Consistent with that position, the Department of Fisheries established special fishing periods for Indians and imposed some restrictions on the commercial fishery by non-Indians in Puget Sound to permit a greater number of fish to reach the areas where the Puyallup Indians engage in their fishing activities. In contrast, the Department of Game construed the same language by this Court, placing weight on the reference to "equal protection implicit in the phrase 'in common with' " (*supra* at 403) and equated this with the Fourteenth Amendment to the United States Constitution. The Department of Game's position, therefore, was that the Puyallup Indian treaty fishing rights were no greater than those of non-Indians and, accordingly, did not permit any commercialization of steelhead by the Indian fishery, since steelhead under state law since 1933 have not been permitted to be sold as a commercial fish, nor caught by other than a hook-and-line fishery.

The state superior court concluded that the state had a responsibility to recognize Indian fishing rights as superior to those of the other state citizens. The regulations adopted by the Department of Fisheries were upheld as being reasonable and necessary for conservation. All parties in that proceeding sought review by the State Supreme Court.

In *Puyallup II*, 80 Wn. 2d 561 (1972), the State

Supreme Court essentially affirmed the position of the Department of Fisheries. But the court rejected the Department of Game's contention that Indians' fishing rights are not superior to those of other citizens. However, upon an examination of the record, it concluded there was justification for the complete prohibition of any net fishery for steelhead in the Puyallup River for the year 1970. The Court concluded that the Department of Game would be obligated to annually review the steelhead runs on the Puyallup River and, if there was a surplus of fish over that necessary for escapement and the hook-and-line sports fishery, then a net fishery for Indians must be permitted.

The Department of Game sought and this Court granted review of steelhead fishing on the Puyallup River. No party sought to review the state court decision involving the Department of Fisheries. It should be noted and emphasized that the Department of Fisheries' regulations did not apportion any specific percentage or quota of fish to the Indian fishery.

Justice Douglas, writing on behalf of this Court in *Puyallup II*, 414 U.S. 44 (1973), reasserted the proposition that Indian off-reservation fishing rights are subject to state regulation but that those regulations must be reasonable and necessary for conservation and not discriminatory. The court concluded there was discrimination because an Indian net fishery was barred and only a hook-and-line fishery,

entirely preempted by non-Indians, was allowed. The discrimination resulted from permitting the entire sports fishery to be considered before the Department of Game would be required to permit any Indian net fishery for surplus fish. *But there was nothing in the record to support the conclusion that the Indians were excluded from the sports fishery.* The record made in this remand proceeding clearly establishes that Indians are permitted, and do[8] participate in the hook-and-line fishery on the same basis as all other citizens with the further provision that they are not required to obtain a state license in their ceded areas. (F.F. IV, D-9)

The majority opinion specifically reserved ruling on the question of whether hatchery planted steelhead are subject to Indian treaty fishing rights at all. Three judges, in a concurring opinion, Justices White, Stewart and Chief Justice Burger, concluded that hatchery-planted steelhead are not subject to the Indian treaty fishery.

This Court did not establish a formula or quota for determining the allowable harvest by Indian fishermen of those fish subject to the treaty, stating:

> Only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species. If hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned. What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like. The aim is to accommodate the rights of Indians under the Treaty and the rights of other people. (*Puyallup II*, 414 U.S. at 48-49.)

[8]Testimony by Ramona Bennett, chairperson, Puyallup Tribal Council, that tribal members participate in the sport fishery. (App. 73.)

This Court's decision was announced November 19, 1973. The Department of Game promptly on November 29, 1973, adopted regulations specifically permitting a net fisheries by Indians for steelhead. (F.F. XX, D-18)

STATEMENT OF THE CASE ON THE REMAND PROCEEDING

Steelhead, an anadromous fish, are naturally spawned in fresh water streams and rivers and normally after two years in the fresh water environment migrate to salt water for a two-year period. (F.F. V, D-10) A majority of the returning steelhead, after two years in salt water, return to the fresh watershed from which they originated and spawn to propagate the next generation. Approximately 5% of those steelhead survive the spawning activity and again migrate to salt water.

The state of Washington has classified steelhead as a game fish (RCW 77.08.020) since 1933, and its citizens are not permitted to fish for steelhead by other than a hook-and-line fishery (RCW 77.16.040) nor to commercially buy or sell steelhead.[9] The state requires its citizens to acquire a fishing license ($7.50) and a $2.00 annual steelhead punchcard to engage in the fishery for steelhead. (See, RCW 77.32.010 and 77.12.031) (F.F. IV; D-9) There are exceptions provided from the payment of license fees to those who are under the age of sixteen, over the age of seventy who have been residents of the state for ten years, certain disabled veterans and treaty Indians fishing within their ceded areas. See, RCW 77.32.010, 77.12.230; *Tulee v. Washington*, 315 U.S. 681 (1942). The license fees which are charged the citizens of the state are placed in the state game fund (RCW 77.12.170) and cannot be used for any purpose other than "the protection, propagation and restoration of wildlife and game and the expenses of administration of the department." (F.F. IV; D-9)

The steelhead resource in Western Washington is relatively small in size compared with the various species of salmon. For example, in 1971 the steelhead catch represented 3.3% of the total steelhead and salmon catch, the respective numbers being 246,000 steelhead and 7,777,000 salmon. Steelhead fishing occurs in 170 to 180 rivers and streams of the state of Washington. Expert witneses testifying in this

[9]The commerical fisheries in the Columbia River for various salmon species do catch, on an incidental basis, steelhead.

remand proceeding both on behalf of the plaintiffs and defendants agreed that so long as there is only a hook-and-line fishery as contrasted with a net fishery for steelhead, there is no need for comprehensive records and data on the steelhead resource. The reason is that the inefficiency of the hook-and-line fishery is such that a reasonable escapement of steelhead will occur for spawning purposes, resulting in a reproduction of the following generations of steelhead. (F.F. VII; D-11) The introduction of a net fishery for steelhead and the management of the same will require the development of more comprehensive information and data than has been compiled in the past. Mr. Heckman, biologist for the defendants, indicated it will probably take three to five years and the expenditure of hundreds of thousands of dollars to develop sufficient data and information to predict accurately in advance run sizes of steelhead to the various watersheds, which is a necessary element in the effective management of a net fishery.

The Department of Game has been engaged for a number of years in a substantial hatchery program to enhance the production of steelhead in the state of Washington. (F.F. IX, D-12) The hatchery program utilizes eggs taken from steelhead, the eggs are hatched and the fish are reared in hatcheries and rearing ponds in various locations in the state of Washington. The state provides food for these hatchery steelhead and normally at the end of one year hatchery steelhead have reached what is referred to

as smolt size and are ready to commence migration to salt water. Such smolt are normally approximately 6 to 8 inches in length. (F.F. IX; D-12) In the natural habitat it normally takes two years for steelhead to reach smolt stage. The consistency of water temperature and availability of food shortens this period to one year in the hatchery program. The hatchery smolts are placed in the watershed at various locations at a time when they are ready to migrate to salt water, normally occurring between April 15th and May 15th on the Puyallup River. This planting program coincides with the natural outward migration of native steelhead smolt and the hatchery planted smolts spend very little time in the fresh watershed.

The Department of Game's hatchery program involves some eighteen hatcheries and nine rearing ponds, with a capital replacement value of $33,652,-241. (F.F. IX, D-12) The annual operational costs of the department for the total steelhead program, fiscal year July 1, 1972 through June 30, 1973, were $1,636,247. (F.F. IX, D-12) The sources of revenue for these expenditures consist of license fees imposed upon citizens of the state as user fees (67%), federal financing of various programs (4%), and from mitigation funds (29%). The total hatchery program of the Department of Game has an annual capacity of approximately 5,000,000 smolts, with nearly 3,000,000 of these being winter-run steelhead.

The Department of Game started planting hatchery steelhead in the Puyallup River in 1933, the year the department was created. (F.F. X, D-12) The planting of hatchery steelhead in the Puyallup River became a substantial and regularly followed program commencing in 1948 to the present time. All of the hatchery steelhead planted in the Puyallup River originate from eggs secured from the South Tacoma Hatchery located on Chambers Creek which is separate and apart from the Puyallup River. This South Tacoma Hatchery is totally financed by state funds and has a current replacement value of $2,531,795.

The direct investment in the steelhead hatchery program on the Puyallup River for the 1972-73 fiscal year was $27,991. During the year 1973, the department planted in the Puyallup River 75,000 steelhead smolts. The normal rate of return of adult steelhead from their salt water environment is approximately 10%, thus reflecting a projected return of 7,500 hatchery fish to the Puyallup River two years after their plant in 1973. (F.F. V, D-10) This reflects a direct investment by the Department of Game of $3.72 per returning adult hatchery steelhead to the Puyallup River. All of the funds used for this planting program on the Puyallup River are state funds derived from the state game fund which in turn is principally dependent upon license fees imposed on

user groups.[10] The benefits of these expenditures is reflected by the trial court finding (F.F. XI, D-14), which is strongly supported by the record, that at the present time slightly in excess of 50% of the total steelhead run in the Puyallup River consists of first generation hatchery propagated steelhead.

The recreational hook-and-line fishery for steelhead as previously noted is an inefficient fishery in the sense of comparing effort to catch. A survey taken during the 1973-74 fishing season on the Puyallup River resulted in some 3,243 persons being actually observed engaging in the hook-and-line fishery for steelhead. At that time those individual fishermen were interviewed, and the interviews reflected that the fishermen at the time of the interview had fished some 9,059 hours (F.F. XIX, D-19). To reflect additional fishing time after the interviews and also to reflect fishermen who were not observed and not "interviewed" a formula explained in the record produced an estimate that for the 1973-74 steelhead season on the Puyallup River, consisting of 121 days, sports fishermen spent 92,514 man hours to catch an estimated 4,354 steelhead.

There are approximately 850 members of the Puyallup Tribe, of which 320 are over the age of 21. Twenty Puyallup tribal fishermen fish essentially full-time with another twenty being basically part-

[10]The only exception to this statement in the last 20 years was a $3,000 grant of federal anadromous fish funds from the U.S. Fish and Wildlife Service to fund a portion of a study conducted by Mr. John Hisata of the Department of Game in 1972-73 re a creel census on the Puyallup River.

time fishermen and, lastly, an additional twenty who only occasionally participate in the fishery. The majority of the Indian fishery is for salmon (F.F. XV, D-16), with the catch of salmon exceeding steelhead on a ratio of approximately 10 to 1. Steelhead which are caught in the Puyallup River average six to eight pounds with a commercial value of approximately $10. While it is difficult to ascertain the Indian catch on the Puyallup River during the 1973-74 seasons, it appears to have been in the neighborhood of 2,500 to 3,000 steelhead.[11]

As previously indicated, the Department of Game promptly following this Court's decision in *Puyallup II*, 414 U.S. 44, adopted regulations specifically permitting a net fishery by Indians for steelhead in the Puyallup River. The special season under that regulation terminated on January 17, 1974, but the Puyallup Tribe continued to fish following the termination of the regulation. They testified that they did not feel nor consider themselves bound by state regulations. That position by the tribe has continued notwithstanding the decision by the state court on the remand of this proceeding. On February 27, 1976, the Pierce County Superior Court found that the tribe and the tribal officers were in contempt for failure to comply with court orders prohibiting

[11]The fish coordinator for the Puyallup Tribe testified to a range of 2,000 to 2,500. The biologist testifying on behalf of the tribe indicated an Indian reported catch of 1,800 steelhead as of January 7, 1974, and the chairwoman of the tribe reported a tribal catch of approximately 700 after January 7, 1974. The biologist testifying on behalf of the Department of Game indicated a catch of approximately 3,000 steelhead.

them from encouraging or participating in a fishery for steelhead after tribal members had caught the apportionment of the steelhead run decreed by the superior court. The court did not impose any sanctions as a result of its judgment for contempt.

The record in this case shows that the tribe has no enforcement officers and depends upon its own fishermen for determining what modifications will be made in Indian fishing regulations. The record further establishes that although the tribe depends in substantial part upon professional advice received from the United States Fish and Wildlife personnel, they have rejected suggestions made by such personnel for reduction in tribal fishing efforts. (App 91-92.)

SUMMARY OF ARGUMENT

The Washington State courts have acted in accordance with the directions of this Court on the remand of *Puyallup II*, 414 U.S. 44. In doing so, the court has provided for an allocation of the harvestable natural run of steelhead in the Puyallup River between the treaty fishermen and nontreaty fishermen and further, has properly determined that hatchery fish which are raised by the State with the expenditure of State funds has resulted in a resource which was not contemplated for inclusion within the provisions of the Treaty of Medicine Creek, *supra*.

The petitioners have continued since the outset of this litigation some fourteen years ago to contend that the State courts do not have jurisdiction to con-

sider this matter. This Court has previously, *Puyallup I*, 391 U.S. 392, rejected the jurisdictional contention by remanding for further proceedings in *Puyallup II*, 414 U.S. 44, and this Court obviously again rejected those contentions. The State is seeking to determine the extent to which it can apply its regulatory powers with relation to fishing activities by individual members of the Puyallup Tribe. When the scope of that power has been defined, the State can then seek remedies against individual Indian fishermen who violate those regulations.

The petitioners have placed considerable weight on the allegation that the Puyallup Reservation continues to exist. It must be emphasized that even if the reservation exists, the record indicates that the Puyallup Indians have and continue to fish for steelhead in the Puyallup River beyond the boundaries of what is alleged to be the Puyallup Reservation. With reference to the reservation question, in *Puyallup I*, 70 Wn. 2d 245, it was declared that the Puyallup Reservation had been terminated and that ruling has never been reversed in these proceedings. Further, the Congressional Record when actions relating to the Puyallup Reservation are considered in light of this Court's recent decision in *De Cotcau v. District County Court*, 420 U.S. 425 (1975), leads to the same conclusion as that expressed in *Puyallup I, supra*; i.e., the Puyallup Indian Reservation was terminated by Congressional action.

The petitioners are challenging the enforceabil-

ity rather than the correctness of the decision made by the State court regarding the allocation between treaty and nontreaty fishermen in the Puyallup River. The basis for requiring such allocation is this Court's decision in *Puyallup II*, 414 U.S. 44. We have respectfuly requested that this Court reexamine that decision. The Washington State Supreme Court in *Puyallup III*, 86 Wn. 2d 664, has acknowledged that it overstated its position in *Puyallup II*, 80 Wn. 2d 561, and thereby may have misled this Court in its decision in *Puyallup II*, 414 U.S. 44. The State court has concluded that but for *Puyallup II*, 414 U.S. 44, it would conclude that the "in common" fishing provision of the Treaty of Medicine Creek, *supra*, protects access to the resource in the form of an easement and precludes the imposition of license fees. However, in all other respects that provision is the equivalent of the Equal Protection Clause of the Fourteenth Amendment.

III.
ARGUMENT

A. Introduction

The Puyallup tribal members predicate their claim for special fishing rights for steelhead on Article III of the Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132, 1133, which provides as follows:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses

> for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

This Court in *U.S. v. Winans*, 198 U.S. 371, 381, 384 (1905), while construing a substantially similar treaty provision with the Yakima Indian Nation concluded that the nature of the fishing right was in the form of an easement and stated, *supra*, at 384:

> it was within the competency of the nation to secure to the Indians such a remnant of the great rights they possess as "taking fish at all usual and accustomed places." Nor does it restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised.

Subsequently in 1942 in *Tulee v. Washington*, 315 U.S. 681, this court again construed the fishing rights provision in the Yakima Indian treaty. The court, *supra* at 684, stated:

> * * * that while the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here [the fee was a license fee, the proceeds of which were deposited in the state general fund].

In *Puyallup II*, 414 U.S. 44 (1973) it was clearly stated that:

(1) The state can regulate in the interest of conservation provided the regulations meet appropriate standards for fishing activities of treaty Indians.

Supra at 45:

> * * * "'right of taking fish, at all usual and accustomed grounds and stations [which] is * * * secured to said Indians, in common with all citizens of the Territory'" extends to off-reservation fishing but that "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." * * *

(2) The Court found that there was discrimination because an Indian net fishery was barred and only a hook-and-line fishery entirely preempted by non-Indians was allowed. There was nothing in that record to support the conclusion that Indians were excluded from the sports fishery and the record in this remand makes clear that Indians do in fact participate in a sports fishery on the Puyallup River.

(3) Net fishing by the Puyallup Indians for commercial purposes is covered by the treaty and the state cannot totally prohibit net fishing even when the number fish necessary for spawning and escapement plus those caught by the sports fishery

substantially equal the entire fish run. Rather, the state must consider the net fishery in conjunction with the hook-and-line sports fishery for steelhead on the watershed. The court stated, *supra*, at 48:

> Only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species. If hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned. What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.

(4) This court emphasized that the fishing activities by both treaty Indians and non-Indians are subject to the conservation needs for the species. The court specifically stated, *supra* at 49:

> We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. * * *

(5) The majority of the court specifically reserved ruling on the question as to whether the Indian treaty fishing rights extended to the steelhead which are developed and planted in the watersheds pursuant to the state's hatchery program. Justice White with Chief Justice Burger and Justice Stewart joining in a concurring opinion specifically stated, *supra* at 49:

> * * * On the other hand, the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen. The opinion below, as I understand it, indicates that the river, left to its own devices, would have an annual run of 5,000 or 6,000 steelhead. It is only to this run that Indian Treaty rights extend. Moreover, if there were no sports fishing and no state-planted steelhead, and if the State, as the Court said it could when this case was here before, may restrict commercial fishing in the interest of conservation, the Indian fishery cannot take so many fish that the natural run would suffer progressive depletion. Because the Court's opinion appears to leave room for this approach and for substantial, but fair, limits on the Indian commercial fishery, I am content to concur.

While courts have indicated that treaties and statutes ratifying agreements with Indians should be construed liberally in their favor (see, *Antoine v. State of Washington*, 420 U.S. 194 (1975)), they cannot under the guise of interpretation, be rewritten to make them mean something they were not intended to mean. *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169 (1947). These

sentiments were also expressed in *Choctaw Nation v. United States*, 318 U.S. 423, 432-433 (1943):

> But even Indian treaties cannot be rewritten or extended beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.

Quoted with approval in *Skykomish Indian Tribe v. France*, 320 F. 2d 205, 207 (9th Cir. 1963).

B. Proper to Exclude Hatchery Fish From the Special Indian Treaty Fishery

When the treaty was negotiated in 1854, there was no hatchery system either in existence or contemplated. It is clear that the parties to the treaty did not envision that either the state, the federal government or any other person would stock the river with hatchery-propagated steelhead. The record shows that the planting of hatchery fish in the Puyallup River commenced in 1933 but did not become a substantial program until 1950 (App. 31-32).

When the treaty was signed, some citizens were engaged in the cultivation and harvesting of shellfish. Although shellfish were native to the area, the investment of time, money and effort in this cultivation and harvesting was specifically recognized by the following provision in the treaty:

> *Provided, however* that they [Indians] shall not take shellfish from any beds staked or cultivated by citizens, * * * (Treaty of Medicine Creek, 10 Stat. 1132, 1133)

This plain language demonstrates that the rights

secured the tribe under the treaty did not include artificially propagated sources of shellfish. It is logical and consistent with that provision to interpret the intention of the parties, had they been aware of the subsequently developed capability to artificially raise and plant steelhead in the watersheds of Western Washington, to have excluded hatchery steelhead from the treaty. Such recognition gives the same effect to the investment of time, energy and money in the hatchery steelhead program as is given the raising of shellfish.

The record in this proceeding is clear and uncontroverted that the state has a substantial investment in the hatchery planting program for steelhead in the Puyallup watershed. It is further clear that the hatchery fish enhance and augment the steelhead run in the watershed and that all fishermen, including Indians, benefit from the hatchery-planted steelhead. (App. 58, 90) We have not found any case precisely ruling upon the question of the status of hatchery fish vis-a-vis treaty fishing rights by Indians, but three Justices of this Court have already in this proceeding concluded that the Indian treaty fishing rights do not reach nor include sharing in the hatchery-planted steelhead. (See quotation from concurring opinion in *Puyallup II*, 414 U.S. 44 at 49, 50, p. 24 of this brief.

The record clearly establishes that the total expenditure for the propagation of the hatchery steelhead on the Puyallup River has been borne by De-

partment of Game funds with the single exception of a $3,000 survey conducted on the Puyallup River in the 1972-73 season. (App. 31) The costs entailed in the steelhead planting program on the Puyallup have reflected an investment of $3.72 for every returning adult hatchery steelhead to the Puyallup watershed. (App. 32) The costs of financing this program are essentially borne by the sportsmen of the state paying license fees and other incidental revenue derived by the Department of Game. (Ex. 74-3, 74-4, 74-5; App. 30-31) This steelhead planting program by the Department of Game in the Puyallup River commenced when the department was created in 1933 and subsequently was substantially increased in 1950 continuing to the present time. (App. 31-32)

The respondent's position is that the Indians' treaty fishing right does not extend to the hatchery supplied fish, irrespective of the source of financing for the planting of those fish. We hasten to add that in the instant case the record clearly shows that insofar as the Puyallup River is concerned, the entire planting program has been from state funds, which are derived from the state game fund, not general.

By analogy, this Court's decision in *Ide v. United States*, 263 U.S. 497 (1924), supports the conclusion that hatchery fish are not included within the provisions of the treaty. The United States instituted suit to enjoin threatened interference with

changes it was making in a natural ravine while completing and perfecting an irrigation system. The ravine had a natural waterflow for approximately 60 days a year, commencing in February. At all other times the ravine was naturally dry. The defendant, a landowner adjoining the ravine, claimed a right by appropriation to the waterflow in the ravine. The United States by the creation of an irrigation system had increased the waterflow in the ravine, which was referred to as an "artificial flow." *Supra*, at 504. The crucial question was whether Ide had any rights to this artificially created extra flow of water in the ravine. This Court held that he did not.

The situation is substantially parallel to that in the instant proceedings; *i.e.*, the federal government expended time, energy and money to create a new artificial flow of water which had not previously existed. Similarly, the Department of Game has through the expenditure of time, energy and money created a run of hatchery propagated steelhead. Further, the United States was able to establish and identify the additional artificial flow of water as contrasted with the previous natural flow that only occurred during 60 days of the year. In the instant case the state department has clearly established its ability to identify the first generation hatchery propagated steelhead from those naturally spawned within the river.

With these factors in mind, the following quotation in *Ide, supra* at 506 from *United States v. Haga*, 276 Fed. 41, 42 (U.S.D.C. Idaho 1921) is particularly apropos:

> "One who by the expenditure of money and labor diverts appropriable water from a stream, and thus makes it available for fruitful purposes, is entitled to its exclusive control so long as he is able and willing to apply it to beneficial uses, and such right extends to what is commonly known as wastage from surface run-off and deep percolation, necessarily incident to practical irrigation. Considerations of both public policy and natural justice strongly support such a rule. Nor is it essential to his control that the appropriator maintain continuous actual possession of such water. So long as he does not abandon it or forfeit it by failure to use, he may assert his rights. It is not necessary that he confine it upon his own land or convey it in an artificial conduit. It is requisite, of course, that he be able to identify it; but, subject to that limitation, he may conduct it through natural channels and may even commingle it or suffer it to commingle with other waters. In short, the rights of an appropriator in these respects are not affected by the fact that the water has once been used."

The *Ide* decision has not been overruled and has been relied upon in *Nebraska v. Wyoming*, 325 U.S. 589 (1945). The court in considering that complex water litigation referred to the segregation of artificial (storage) water and the natural flow of water. *Supra* at 596, 605, 606, 630, 636, 640. In all of these references the court recognized the necessity of segregating the artificial from the natural flow of water and again quoted with approval the

foregoing language from *Ide v. U.S.. Supra* at 636.

We respectfully submit that the court's exclusion of hatchery reared steelhead from the Indian treaty fishing right is consistent with a reasonable reading of the treaty, with *Ide, supra,* and with any reasonable concept of any equity and justice.

C. "Puyallup Reservation"

1. Introduction

Following the enactment of the Cushman Act of 1904 (33 Stat. 565), the former Puyallup Reservation was considered to have been terminated. See, *State v. Smokalem*, 37 Wash. 91, 79 Pac. 603 (1905). Consistent with that conclusion, the court in *Puyallup I* (70 Wn. 2d 245 at 253) concluded that the Puyallup Reservation had been terminated and no longer existed. Subsequently in 1971 the Acting Assistant Solicitor of the Department of Interior issued a memorandum expressing the opinion that the Puyallup Reservation had not been terminated and still exists. Following that opinion the United States Attorney on behalf of the United States government, filed an action in the United States District Court for Western Washington, No. 39-71C3, seeking a declaration that the Puyallup Reservation exists and that the tribal members have exclusive rights to regulate all fishing on or in the Puyallup River within the Puyallup Reservation. The United States District Court rejected those contentions and concluded that the Puyallup Indian Reservation had been terminated. Subsequently the Ninth Circuit in

U.S. v. Washington, 496 F. 2d 620 (1974) cert. den. 419 U.S. 1032 (1974), concluded in a per curiam opinion that the Puyallup Indian Reservation exists and remanded the cause to the trial court for proceedings in conformity therewith. No further actions have been taken in that proceeding.

Even if one accepts the premise asserted by the petitioners; i.e., that the Puyallup Reservation exists and encompasses the Puyallup River, it is clear from the record in this proceeding that the fishing activities of the members of the Puyallup Tribe are not confined to the reservation area. Thus, even if the reservation exists and if that existence precludes the exercise of state jurisdiction within it, there remains the off-reservation fishing activities by Puyallup Indians, which are clearly subject to the state's jurisdiction.

2. The Puyallup Reservation No Longer Exists

The issue presented by petitioner on certiorari raises the fundamental question of whether there is in fact a Puyallup Reservation. We recognize that the Ninth Circuit decision in *United States v. Washington, supra* has concluded in a per curiam opinion on the basis of *Mattz v. Arnett*, 412 U.S. 481 (1973) that the Puyallup Reservation exists. There are, however, significant differences between the Klamath Reservation (*Mattz*) and the "Puyallup Reservation" which have been highlighted by this court's more recent decision in *De Coteau v. District County*

Court, 420 U.S. 425 (1975) wherein the Tenth Circuit Court of Appeals' finding that the Lake Traverse Reservation continued to exist was reversed by this court. We recognize that the termination of a reservation does not terminate hunting and fishing rights associated with the reservation area. See *Menominee Tribe v. United States*, 391 U.S. 404 (1968), *Kimball v. Callahan*, 493 F.2d 564 (Ninth Cir. 1974) cert. den. 419 U.S. 1019 (1974). But the termination of the reservation does mean that the area is subject to state jurisdiction so as to permit that jurisdiction to be exercised regarding treaty hunting and fishing rights.

The area which had been the Puyallup Reservation has been subject to state jurisdiction since the effective dates of the Congressional consent to the alienation of land and its removal from its prior status as an Indian reservation. See *United States v. Kopp*, 110 F. 160 (U.S.D.C. Western Washington (1901)) and *State v. Smokalem*, 37 Wash. 91, 79 Pac. 603 (1905). The area in question had clearly lost its characteristics as "Indian country" or reservation and now comprises an integral part of the City of Tacoma, the third largest city in the State of Washington and the surrounding urban and industrial areas.

We have included in the appendix to this brief a map showing the boundaries of the 18,000 acre Puyallup Indian Reservation. This map clearly indicates that within those boundaries are located a

major part of the Port of Tacoma industrial development district, various small towns, part of the third largest city in the State of Washington (Tacoma), and the major north-south Interstate Highway No. 5. We have examined the 1970 census tracts for this area in Pierce County, Washington, and nine census tracts are completely within those boundaries (Nos. 601, 602, 621, 622, 633, 705, 708, 709, and 710), which reflect a total population of 22,848 with an Indian population of 579. When the proportional part of the three census tracts which lie partially within the boundaries and partially without (Nos. 620, 623 and 707) are divided to represent on the same proportion population as the portion of the tract which lies within the boundaries, it reflects a total population in this area of 26,666 with an Indian population of 636.

Thus, the area obviously has none of the usual attributes of an Indian reservation and, in fact, is indistinguishable from any other urban-industrial area.

In this portion of the brief we will examine the creation and termination of the Puyallup Reservation and compare it with the Klamath (*Mattz*) and Lake Traverse (*De Coteau*). First we should consider the formation of the Puyallup Reservation and its subsequent termination pursuant to Congressional authorization.

The Treaty of Medicine Creek was executed on December 26, 1854, between the United States and

representatives of the various Indian tribes in Western Washington including the Puyallup Indians. The treaty is reported in 10 Stat. 1132, the pertinent provisions thereof being Articles II and VI, which are set forth in the Brief's Appendix, page 70. Under the provisions of the treaty, the reservation which was established for the Puyallup Indians was changed by Presidential Executive Orders dated January 20, 1857 and September 6, 1873. Those Executive Orders are cited in *Indian Affairs, Laws and Treaties*, Kappler (1904) pages 1919, 1922 and 1923.

In 1884, the United States Congress permitted the allotment of lands which were included within the Puyallup Indian Reservation. 23 Stat. 76, 88-89.

The State of Washington, after being admitted to the Union in 1889, in 1890 passed an act removing all restrictions on the alienation of lands allotted to the Puyallup Indians, *subject to Congressional approval* (RCW 64.20.010, quoted in Brief's Appendix, page 71.) Pursuant to a Congressional enactment, 26 Stat. 336, 354, a three-man commission was appointed in 1890 to study the nature of land title within the Puyallup Reservation and to make recommendations to the Secretary of Interior concerning the future disposition of that land. In light of the inconclusive nature of a Puyallup commission report dated March 11, 1891, Congress on March 3, 1893, enacted the Puyallup Allotment Act, 27 Stat. 612 at 633 (quoted in Brief's Appendix, pages 71-74).

The act provided for a three-member commission appointed by the President to select and appraise property within the Puyallup Reservation and further provided for the sale of lands within the reservation with the approval of the Secretary of the Interior, and specifically provided:

> * * * which deeds shall operate as a complete conveyance of the land upon the full payment of the purchase money; * * * *Provided*, That the portion of the agency tract selected for sale shall be platted into streets and lots as an addition to the City of Tacoma, * * * *And provided further*, That the Indian allottees shall not have power of alienation of the allotted lands not selected for sale by said Commission for a period of ten years from the date of the passage of this act * * *

As of January 19, 1904, all of the lands, except approximately 36 acres of the 18,000, had been allotted under the 1893 act. In response to questions as to the legal effect of the ten-year prohibition on alienation under the 1893 act for Indian allottees, Congress enacted the Cushman Act, 33 Stat. 565, in 1904, making express Congressional consent to the removal of all restrictions on alienation, providing:

> That the Act of Congress approved March third, eighteen hundred and ninety-three (Twenty-seventh Statutes, page six hundred and thirty-three), authorizing the sale of the Puyallup allotted lands, with restriction upon alienation 'for a period of ten years from the date of the passage' thereof, shall be taken and construed as having expressed the consent of the United States to the removal of restriction upon alienation by said Puyallup Indians to

> their allotted lands from and after the expiration of said period shall be given effect of having been made without any restrictions upon the power of the allottee to alienate his land.

The Cushman Act reaffirmed the Congressional consent to the alienation of lands on the Puyallup Reservation and was a clear confirmation of the state's acceptance of jurisdiction provided in the state 1890 enactment (quoted in the Brief's Appendix, pages 71-74).

In 1893 Congress considered the removal of the restrictions on alienation and enacted 27 Stat. 612 at 633. The discussions in the Congressional Record on this provision indicate the only "problem" relative to the legislation was that some individuals had previously acquired secret leases from the Puyallup Indians. Under the terms of those leases, the lessee would receive a conveyance of the property when the restrictions on the alienation were removed. See, Volume 24, Congressional Record, 42nd Congress, pp. 2379-80, March 2, 1893, United States Senate. Other comments relating to the Puyallup in the Congressional Record, *supra*, at pages 2068, 2070, 2136, 2137, 2389 and 2390, cannot be construed as indicating any Congressional rejection of an abolition of the reservation.

Subsequently in 1904, when Congress enacted the Cushman Act, 33 Stat. 565, the Congressional Record of the 58th Congress, Volume 38, at pp. 2605-2607, contains extensive material relating to the Act, including the following.

Senator Cushman explained that the general purpose of the legislation was to clarify the 1893 act to make it clear that the alienation permitted under that act was effective and to make express Congressional consent to the removal of all restrictions on alienation. The language of the 1893 act which prohibited alienation by Indians for a period of ten years had created problems in obtaining title insurance for transfers after the ten-year period.

Two letters from W. A. Jones, Commissioner of Indian Affairs, which were inserted in the Congressional Record make clear that there was no Congressional intention to continue a Puyallup Reservation. The first letter was to the Honorable A. G. Foster of the United States Senate dated November 18, 1903, which stated in part:

> * * * Neither this office nor the department is now exercising any control whatever over the sale of Puyallup allotted lands. The Indians are left to dispose of the same, if they so desire as they see fit. * * * (38 Congressional Record 2608)

The second was addressed to the Secretary of Interior dated December 19, 1903, which stated in part:

> Under the provisions of the treaties referred to, the restrictions upon the sale and conveyance of these lands, and upon their taxation, etc., were to continue in force until a state constitution embracing such lands within its boundaries should be formed and the legislature thereof should remove the restrictions with the consent of Congress. As indicated above, the

state first removed the restrictions in the year 1890, and in 1893 Congress passed what is known as the Puyallup Act, containing the provision above noted, intending, as it would seem, to remove the restrictions fully and completely upon the sale of Puyallup allotted lands by the Indians and true owners thereof.

This office does not see any objection to the passage of the bill under consideration. It is not seen that it can do the Indians and true owners of these unsold allotments any harm or injury. Should it become law, it would certainly be clear to all concerned that the government thereby gives its absolute, full, and complete consent to the removal of the restrictions mentioned.

We do not find any Congressional references to the Puyallup *Reservation* following the 1904 act, *supra*. Acts in which we find reference to Puyallup but not "Puyallup Reservation" are as follows:

34 Stat. 1015 at 1050 (1907). Reference is made to the Puyallup agencies and further the Secretary of Interior was authorized with the Puyallup Indian consent to sell lands reserved for cemetery and school purposes. It is notable that the same statute when it refers to the Colville on the same page, refers to the "Colville Reservation." But, no reference is made to the Puyallup Reservation.

45 Stat. 378 (1928). An appropriation of funds for the upkeep, maintenance and care of the "Puyallup Indian Cemetery." Again, no reference to a Puyallup Reservation.

46 Stat. 1526 (1931). Provided for the distribution of tribal funds to the Puyallups, but again, no references were made to a Puyallup Reservation.

50 Stat. 564 at 587 (1937). An appropriation for the care and upkeep of the Puyallup Indian Cemetery. Again, no reference to a Puyallup Reservation.

52 Stat. 291 at 314 (1938). An appropriation for the care and upkeep of the Puyallup Indian Cemetery. Again, no reference to a Puyallup Reservation.

53 Stat. 1405 (1939). Authorization for the Secretary of Interior to acquire 38 and 51/100th acres from the Puyallup Indians for an Indian Sanitarium. Again, no reference to a Puyallup Reservation.

56 Stat. 1040 (1942). This act related to a change in the Puyallup tribal roll and an appropriation to complete the acquisition of title to the Puyallup Indian tribal school properties. Again, no reference to a Puyallup Reservation.

The foregoing clearly indicates that Congress has not since the 1904 Cushman Act made reference to nor recognized the continuing existence of the Puyallup Reservation.

We should now turn to a comparison of the Klamath Reservation (*Mattz, supra*) Lake Traverse (*De Coteau, supra*) and the Puyallup with reference to the elements which have been considered by this Court to be of importance in determining whether an Indian reservation has been terminated.

a. Congressional history, not only of the specific act but also previous congressional proposals to abolish a reservation.

(i) *Klamath Reservation:*

This Court observed in *Mattz, supra,* at 500, 502, that eight Congressional bills were introduced during the period of 1879-1892 and

> Each bill would have "abolished" the reservation and would have made the land subject to homestead and preemption of entry, (*supra,* 501)

This Court after having extensively considered the legislative history of unsuccessful attempts to specifically "abolish" the Klamath River Reservation, stated, *supra,* at 502:

> It is against this background of repeated legislative efforts to terminate the reservation, and to avoid allotting reservation lands to the Indians, that the 1892 Act was introduced.

Furthermore, the Court observed that the legislative history of the enactment of the 1892 Klamath Act shows that the United States Senate specifically deleted the reference in the original House Bill to "the removal of the Indians from the land" and substituted a provision that land should be allotted to the Indians under the General Allotment Act of 1887 (*Mattz, supra,* at 503).

(ii) *Puyallup Reservation:*

There is no indication of prior unsuccessful congressional efforts to abolish the Puyallup reservation prior to or during the period the Congress enacted 26 Stat. 336 (1890), 27 Stat. 612 (1893) and 33 Stat. 565 (1904).

(iii) *Lake Traverse Reservation:*

No references are made by this court in *De Coteau* to unsuccessful efforts in Congress to abolish the reservation.

b. Subsequent congressional acts continuing to recognize the existence of the Indian reservation.

(i) *Klamath Reservation:*

This Court noted two specific references to the Klamath River Reservation in the *Mattz* decision, *supra* at 505. Those specific statutes are:

> 56 Stat. 1081 (1942), Congress made specific reference to the "Klamath River Reservation." Subsequently in 1958, in 72 Stat. 121, Congress in listing Indian reservations included "Klamath River, California."

(ii) *Puyallup Reservation:*

There are no subsequent references to the Puyallup Reservation in federal statutes. See those statutes previously referred to in this brief, pp. 38. In *De Coteau, supra,* at 442 this Court noted that the continued activities of federal Indian agents and regular appropriations by Congress to the tribes for their welfare did not constitute a recognition of continued reservation existence.

(iii) *Lake Traverse Reservation:* This Court did not observe any subsequent congressional references to a Lake Traverse Reservation, after the act which this Court construed to constitute a termination of that reservation.

c. Continued recognition by federal agencies.

(i) *Klamath Reservation:*

This court specifically noted in *Mattz, supra*, at
505

> Finally, our conclusion that the 1892 Act did not terminate the Klamath River Reservation is reinforced by repeated recognition of the reservation status of the land after 1892 by the Department of the Interior and by Congress. In 1904 the Department, in Crichton v Shelton, 33 ID 205, ruled that the 1892 Act reconfirmed the continued existence of the reservation. In 1932 the Department continued to recognize the Klamath River Reservation, albeit as part of the Hoopa Valley Reservation and it continues to do so today.

(ii) *Puyallup Reservation:*

The Puyallup Reservation has been subject to the state's jurisdiction since the effective dates of the Congressional consent to the alienation of the land and the removal of its status as an Indian reservation. See *U.S. v. Kopp, supra* (1901), and *State v. Smokalem, supra* (1905). The contention that the reservation was not terminated was not raised until a 1971 opinion of an acting assistant solicitor of the Department of Interior who issued an opinion similar to the 1972 solicitor's opinion giving rise to the Lake Traverse litigation.

(iii) *Lake Traverse Reservation:*

This court observed that the state jurisdiction had gone virtually unquestioned until the 1960's. The case was precipitated by a 1972 opinion by the Solicitor of the Department of Interior concluding that the reservation had not been terminated.

d. The nature of the interest which was conveyed by the sale of lands within the reservation.

(i) *Klamath Reservation:*

The 1892 Klamath Act, 27 Stat. 52, provided that the sale of patents were subject to a trust provided "heirs of any deceased settler shall succeed the rights of such settlers under the act".

(ii) *Puyallup Reservation:*

The 1893 Puyallup Act, 27 Stat. 612 at 633, provided that the deeds which were to be issued for the sale of the property were "to operate as complete conveyance."

(iii) *Lake Traverse Reservation:*

This provided for complete conveyance.

e. What portion of the lands within the reservation were to be conveyed.

(i) *Klamath Reservation:*

The 1892 Act reserved from settlement or entry "any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupancy of said village or settlements of Indians."

(ii) *Puyallup Reservation:*

The only land not available for sale by the commission under the 1893 Act, *supra*, was the "homes of the Indian allottees; and also that part of the agency tract, exclusive of the burying grounds; not needed for school purposes. * * *" This resulted in only one-half of one percent of the 18,000 acres

being retained in trust status for the Puyallup Indians.

(iii) *Lake Traverse Reservation:*

All of the land within the reservation with the exception of that allotted to individual Indians in 160 acre allotments was subject to disposition by the United States. This Court observed in *De Coteau*, *supra*, at 428 that this resulted in about 15% of the land being retained in the form of Indian trust allotments.

f. Limitations upon the ability of the purchaser to reconvey the lands.

(i) *Klamath Reservation:*

This Court in *Mattz* construed the 25-year trust period provided for in 24 Stat. 390 as applying to the lands transferred under the act. Further, Congress specifically extended that trust period in 1919 by 56 Stat. 1081.

(ii) *Puyallup Reservation:*

The 1893 Act, *supra*, permitted the Commission to alienate lands without any trust period. The only lands which were subject to the trust were those which were included in the following proviso "That the Indian allottees shall not have the power of alienation of the allotted lands not selected for sale by said Commission for a period of ten years from the date of the passage of this act. * * *" The 1904 Act, *supra*, clearly and explicitly removed the alienation restriction on the allotments referred to in the proviso.

(iii) *Lake Traverse Reservation:*

No trust period or limitation on the ability to alienate the lands obtained was imposed.

We respectfully submit that the foregoing considerations relating to the former Puyallup Reservation and its comparison with the termination of the Lake Traverse Reservation as decreed by this Court in *De Coteau, supra*, fully support the conclusion that the Puyallup Reservation does not exist as an Indian reservation.[12]

3. THE DETERMINATION THAT THE PUYALLUP RESERVATION NO LONGER EXISTS HAS NOT BEEN REVERSED IN THE INSTANT PROCEEDINGS

At the conclusion of the original trial of this action, the trial court found:

> All the lands within the exterior boundaries of the old Puyallup Indian Reservation were sold, in fee simple absolute, pursuant to an act of Congress (33 Stat. 565) with the exception of two small tracts which are presently being utilized as a cemetery for members of the federal organization known as the "Puyallup Tribe." The total acreage remaining in trust status is approximately 22 acres. The original reservation was in excess of 18,000 acres. (Find. Fact XII quoted in *Puyallup I*, 70 Wn. 2d at 253)

The Washington State Supreme Court affirmed that conclusion, which was directly challenged in the

[12]This Court currently has under consideration in No. 75-562, orally argued on January 12, 1977, review on certiorari of the reservation question in *Rosebud Sioux Tribe v. Kneip*, 521 F. 2d 87 (8th Cir. 1975). We respectfully submit that an affirmance of the Circuit Court opinion in *Rosebud, supra*, would compel the conclusion that the Puyallup Reservation no longer exists. However, if this Court reverses or modifies *Rosebud*, it would not necessarily result in a determination that the Puyallup Reservation continues to exist.

brief submitted by the Puyallup Tribe to this Court, page 43, wherein it was stated:

> The Indian petitioners submit that unless and until Congress enacts a termination act terminating federal supervision over the Puyallup Indian Reservation or constricting the boundaries of the original Puyallup Indian Reservation, the original boundaries mark the area within which the fishing rights reserved to them by the Treaty of Medicine Creek may be exercised without restriction by state laws or regulations.

In response to that contention, this Court noted in *Puyallup I*, 391 U.S. at 395, footnote 1,

> Whether in light of this history the reservation has been extinguished is a question we do not reach.

There has been no subsequent ruling in this Puyallup proceeding which has reversed that determination that the Puyallup Reservation no longer exists.[13] We therefore submit that conclusion is the law of the case and is binding in this proceeding unless this Court concludes that the Puyallup Reservation has not been terminated.

4. THE NINTH CIRCUIT RESERVATION DECISION

We have noted that the Ninth Circuit Court of Appeals in finding that the reservation had not been terminated remanded the matter for further proceedings. No further proceedings have been held and thus there has been no judicial determination as to the current boundaries of the reservation,

[13]See footnote No. 7, *supra*.

whether the reservation has been diminished or whether the Puyallup River, the course of which has been altered by action of the United States Corps of Engineers, has resulted in an ownership of the bed of the river by the United States government, or whether such ownership is in trust for the Puyallup Tribe.

The United States District Court observed in its memorandum opinion at page 3 (*U.S. v. Washington*, West. Dist. Wash. No. 39-71 C-3):

> *Assuming without deciding* that the members of the reorganized Tribe have some claim to the present bottom of the Puyallup River, it does not follow that the riverbed is the Puyallup Reservation. (Emphasis supplied)

The absence of a decision on that question is significant in light of the United States District Court in Montana in *U.S. v. Finch*, 395 F. Supp. 205 (1975) having concluded that the Big Horn River, which crosses the Crow Reservation, is not Indian trust land, distinguishing that situation from this Court's holding in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), involving the Arkansas River. What area is within the reservation and whether the riverbed would be considered to be Indian trust land are pertinent because the State of Washington pursuant to the authorization granted by Public Law 83-280 has assumed the responsibility of state jurisdiction over Indian reservations. The state jurisdiction under chapter 37.12 RCW applies to activities by enrolled members of the tribe on an established

reservation except those actions which occur on tribal and trust lands.

We recognize that Public Law 83-280 (25 U.S.C. 1321(b)) provides:

> Nothing in this section * * * shall deprive any Indian or Indian tribe, band or community of any right, privilege, or immunity afforded under federal treaty, agreement, or statute with respect to hunting, trapping, or fishing, or the control, licensing, or regulation thereof.

When the State of Washington assumed jurisdiction, the same language was incorporated in Revised Code of Washington 37.12.060. However, this disclaimer of jurisdiction depends upon the existence of a priviledge or immunity granted by federal law related to hunting and fishing. As we have previously noted, the state court has concluded, pursuant to the remand of this Court, that hatchery fish are not subject to the provisions of the Treaty of Medicine Creek. Further, also pursuant to *Puyallup II* requiring an allocation of the harvestable fish, it has been determined that 55% of the native fish are not subject to harvest by the treaty Indians.

Thus these fish are not included within "any right, privilege, or immunity afforded under federal treaty, agreement, or statute * * *" hence the limitation on the exercise of state jurisdiction imposed by Public Law 83-280 is not applicable. Thus, the application of the state's jurisdictional act (chapter 37.12 RCW) means that the state has jurisdiction even within the reservation over fishing activities by Puyallup Indians when those activities exceed the treaty entitlement; i.e., 45% of the natural harvestable run. The only limitation is that the 1963 act (chapter 37.12 RCW) does not apply to tribal members within the reservation whose acts occur on tribal or trust lands. Thus, to the extent that Indian fishing activities do not occur on trust or tribal lands, even if one assumes the existence of the reservation, the state has jurisdiction to enforce the decree entered in this proceeding allocating the natural harvestable steelhead run in the Puyallup River and excluding from any special treaty fishery the hatchery steelhead run in the river.

D. The State Court Properly Exercised Jurisdiction Over the Subject Matter and the Parties

This action was initially commenced in 1963 to determine the nature and extent, if any, of treaty fishing rights of Puyallup Indians. In the course of the fourteen years of this litigation, including three trials, three State Supreme Court decisions, and two decisions by this Court, there have been consistent objections to the exercise of jurisdiction by the Washington State Courts. Those contentions were expressly considered by this Court in *Puyallup I*, 391 U.S. 392, at 396 footnote 11 wherein the contentions were rejected.

In *Puyallup II*, 414 U.S. 44, no explicit statement was made by this Court on the question of jurisdiction. However, the fact that this Court ex-

plicitly remanded the proceedings for determination of an allocation that accommodates the rights of the Indians under the treaty and the rights of other people was an express confirmation of continuing jurisdiction by state courts in this matter. If the petitioners' contention was valid, it would mean that this Court's direction to allocate the fish harvest would for all practical purposes have been impossible to establish, implement, and enforce. Surely this Court did not intend to direct the Washington State Courts to perform a useless act.

The right of the State to regulate its fishery resource has long been established by this Court. *McCready v. Virginia*, 94 U.S. 390 (1876); *Manchester v. Massachusetts*, 139 U.S. 240 (1891); *Ward v. Racehorse*, 163 U.S. 504 (1896); *U.S. v. Winans*, 198 U.S. 371 (1905); *Kennedy v. Becker*, 241 U.S. 556 (1916); *Tulee v. Washington*, 315 U.S. 681 (1942); *Lacoste v. Department of Conservation*, 263 U.S. 545 (1924); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962); *Puyallup I*, 391 U.S. 392 and *Puyallup II*, 414 U.S. 44. The State's concern with the regulation of its natural resource is clearly within its jurisdiction. The State in this proceeding has sought and continues to seek a determination as to the extent to which the State can regulate its fishing resource for the purposes of conservation. To determine the extent of that power with reference to Indian treaty rights, it is necessary to ascertain the individual rights which Indians possess so that

injunctive or other appropriate individualized relief can be sought against those Indians who violate the valid exercise of the State's regulatory power. This Court has consistently rejected the petitioners' claim of lack of jurisdiction and should continue to do so and thereby permit a final resolution on the merits of this fourteen years of litigation.

E. Reconsideration of Puyallup II, 414 U.S. 44

1. Request to Reconsider *Puyallup II*

This Court in *Puyallup II*, 414 U.S. 44, for the first time expressly recognized that net fishing by Indians for commercial purposes is covered by the Treaty of Medicine Creek.[14] In the same decision this Court for the first time required that there be an allocation between the treaty and non-treaty fishermen of the harvestable portion of the fish. The Washington Supreme Court in *Puyallup III*, 86 Wn. 2d 664, at 671, concluded that when it had considered this matter in *Puyallup II*, 80 Wn. 2d 561, it had erred in concluding that an Indian net fishery was a matter of right under the treaty and that error may have misled this Court in its resolution of *Puyallup II*, 414 U.S. 44. The State Supreme Court recognized that it is bound by this Court's decision in *Puyallup II*, 414 U.S. 44, but indicated that its independent conclusion would be that no allocation of the harvestable steelhead run is required and there is no special commer-

[14]We recognize that the Court made reference to *Puyallup I*, 391 U.S. 392 at 398-399 in support of that statement, but that decision does not explicitly state that commercial fishing is covered by the treaty.

cial entitlement. The State Court stated, *supra*, at 688:

> The first phase in our opinion is held in abeyance pending a final disposition of the treaty interpretation issue by the United States Supreme Court, at which time a reversal of the trial court decision, consistent with the first phase of this opinion, may be necessary.

The need for a reexamination of *Puyallup II* arises from the judicial construction of Indian treaties in western Washington, virtually the same as the Treaty of Medicine Creek, *supra*, which have followed this Court's *Puyallup II*, 414 U.S. 44, announcement of an allocation requirement and the inclusion of commercial fishing within the purview of the treaties. We believe that such interpretations have exceeded that which was contemplated by this Court in *Puyallup II*, *supra*, to such an extent that this Court should reconsider its *Puyallup II* decision.

A senior Federal District Court Judge in Western Washington has determined as a matter of law that the treaty phrase fishing "in common with all citizens of the Territory" requires as a matter of law a 50% allocation of the harvestable fish to treaty fishermen. *U.S. v. Washington*, 384 F. Supp. 312 (W.D., Washington) (1974) affirmed 520 F. 2d 676 (Ninth Cir., 1975), *cert. denied*, 423 U.S. 1086 (1976). The manner by which that Court has computed a 50% allocation is as follows:

1. Exclude from the total of harvestable fish all

fish which treaty fishermen either catch or desire to catch within the boundaries of Indian reservations.

2. Exclude from the total harvestable fish all fish that the treaty fishermen harvest for personal consumption or ceremonial purposes.

3. The remainder of the harvestable fish, after having subtracted No. 1 and No. 2 above, are divided into two parts with 50% reserved for the treaty fishermen. Further, the total harvestable fish includes those fish which are harvested in the ocean which is more than 180 miles from fishing grounds of the Puyallup Indians in and near the Puyallup River.

4. Then add to the treaty fishermen's 50% additional fish to reflect the harvest by Washington citizens beyond the territorial limits of the State of Washington.

5. Any fish which are caught by treaty fishermen at areas other than their usual and accustomed fishing grounds are counted not as part of the treaty 50% but rather are chargeable to the non-treaty allocation.

Although the district court relied primarily on a dictionary definition and ruled as a matter of law, the Court of Appeals affirmed that decision on the basis that the trial court had not abused its discretion in creating the 50% share.

In the area impacted by that decision, there are 283,650 salmon and sports fishermen, 145,000 licensed steelhead sports fishermen, 6,600 non-Indian commercial fishermen and 794 Indian commercial

fishermen. The Indian population accounts for only 0.28% people living in the area and most of that Indian population has been completely acculturated. Only 0.07% of the population are Indians still living within the boundaries of reservations.

In the instant proceedings, the state court has determined that 45% of the harvestable natural steelhead within the Puyallup River are subject to harvest by individual Indians. The remaining 55% are harvestable by sports fishermen since a commercial fishery for non-Indians is prohibited. In making that allocation the Court considered a number of factors including the 20 tribal fishermen who essentially support their families with the proceeds of the fishery, with an additional 10 providing a majority or partial support by fishing activities.[15] The harvest of salmon exceeds steelhead by a ratio of approximately 10 to 1 by the tribal members. The other fishing group; *i.e.*, the sports fishermen on the Puyallup consist of 3,243 fishermen who spent 92,514 hours on the river to catch 4,015 fish. This reflects some 23 fishing hours per steelhead being caught by sports fishermen on the Puyallup River. The basic inefficiency of harvesting fish by a hook-and-line fishery is such that relatively few regulations must be imposed. For example, the state limits the maximum catch to two steelhead per day with a maximum of 30 per year per fisherman. However, when a commercial fishery is introduced, a

[15]There are an additional 20 members of the tribe who fish occasionally, but normally that fishing does not include steelhead. (SF 759-60)

substantially more sophisticated on-going regulatory pattern is necessary to protect the fish resource. The existence of Indian net fisheries for steelhead has substantially increased the costs incurred by the State of Washington in managing the resource.

We submit that the consequences of this Court's *Puyallup II* decision requiring an allocation and recognizing a commercial fishery has had such an impact as we have indicated to warrant this Court reexamining that decision.

2. "In Common"—Treaty of Medicine Creek

The 1854 Treaty of Medicine Creek (10 Stat. 1132) has only one reference to the taking of fish which is found in Article III which we here requote for ease of reference:

> Article III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, *in common with all citizens of the Territory*, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however*, That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter. (Emphasis supplied)

The crucial language is the phrase "secured to said Indians, in common with all citizens * * *" The *Indians'* right is in common with *all citizens*. This is not a tribal right in common with the right of the government of the territory. When the right to

fish "in common" is considered with the proviso that Indians "shall not take shellfish from any bed staked or cultivated by citizens," the intent to make the usual and accustomed grounds and stations public places to which the Indians would have access along with non-Indian becomes clear. In considering this treaty language, reference should be made to the treaty with the Yakimas (12 Stat. 951) which is similar to the Medicine Creek Treaty including the right to fish off reservation "in common with all citizens of the Territory."[16] The reason for referring to the Yakima Treaty is that it reserves "the right in common with citizens of the United States to travel upon all public highways." The contemporaneous use of the words "in common" shows exactly what was intended—the Indians retained the opportunity to fish and so did the citizens of the territory. It is difficult to conceive that the term "in common" with reference to travelling on the public highways means the Yakima Indians are entitled to a specific part of the use of the highways; *i.e.*, one-half or any other established allocation of use. When the same phrase "in common" is used in the next sentence of the Yakima Treaty, with reference to fishing, we submit that the phrase means the same in both contexts, that is, it reserves the opportunity to use the public facilities or resources on the same basis as other citizens of the territory.

[16]Unlike the Medicine Creek Treaty, *supra*, that Yakima Treaty reserves the exclusive right to fish within the reservation, a similar explicit exclusive provision is included in the treaty with the Walla Walla of 1855 (12 Stat. 945).

This Court has considered the Yakima Treaty and the "in common" fishing provision in *U.S. v. Winans*, 198 U.S. 371 (1905), *supra* at 381. This Court noted that the taking of fish

> was a right outside of those boundaries reserved 'in common with the citizens of the Territory.' As a mere right, it was not exclusive in the Indians. Citizens might share it, the Indians were secure in its enjoyment by a special provision of means for its exercise.

This Court further found that the existence of that right did not restrain the State unreasonably, if at all, in the regulation of the right. However, it does fix in the land such easements as enables the right to be exercised. Thus this Court has construed the in common language to protect the Indian's right of access to the fishing areas. A similar conclusion was reached by this Court in *Seufert Brothers Co. v. United States*, 249 U.S. 194 (1919), *supra* at 196, where the Court observed:

> * * * they have shared such places with the Indians of other tribes from the south side of the river and with white men. This shows clearly that their understanding of the treaty was that they had the right to resort to those fishing grounds and to make use of them in common with the other citizens of the United States. * * *

This reading of the phrase "in common with" comports with the situation of the Indian tribes at the time of treaties. No formal political structures had been created by the Indians living in the Puget Sound area at the time of initial contact with the

United States Government. The United States organized the tribes and bands into formal political entities for the purposes of negotiating the treaties. But such political super-structures had no relevance to the Indians fishing activities. In an extensive report on Indian tribes of the Territory of Washington dated March 4, 1854, by George Gibbs (submitted to the Department of the Interior under the title "Tribes of Western Washington and Northwest Oregon", Part II, page 186, Dr. Gibbs observed:

> as regards the fisheries, they are held in common, and no tribe pretends to claim from another, or from individuals, seignorage for the right of taking, in fact, such claim would be inconvenient to all parties, as the Indians move about on the sound particular, from one to another locality, according to the season.

Mr. James Doty in the minutes reflecting the treaty negotiations stated with reference to Article III, which is the Indian fishing provision,

> It was also thought necessary to allow them [the Indians] to fish at all accustomed places, since this would not in any way interfere with the rights of citizens and was necessary for the Indians to obtain a subsistence."
> Indians to obtain a subsistence. [cited by the trial court in Puyallup III, Appendix C-23].

This makes it clear that the Indians did not have a concept of a property interest in the resource, but rather the interest was in using various locations to harvest fish. It further indicates that the Indians were conversant with the concept of sharing locations since they shared their fishing opportunities with

other Indians and settlers. It is consistent with the concern of retaining access to locations to characterize the "in common" as an easement or access to the fishing areas which was the conclusion expressed by this Court in *U.S. v. Winans, supra.*

The United States Government and Lummi Indians in 1897 unsuccessfully attempted to enjoin the Alaska Packers Association from operating fish traps licensed by the State of Washington at Point Roberts, Washington. *U.S. v. Alaska Packers Association*, 79 Fed. 152 (Cir. Ct. Washington 1897). The Lummi Indians' Treaty of Point Elliot (12 Stat. 928) contains a treaty provision the same as that in the Medicine Creek Treaty re: fishing in common. The court observed, *supra*, at 155:

> * * * the words of this article indicate a purpose to secure to the Indians equality of rights, coequal with the rights of citizens, and not exclusive rights at any particular places.

The Court while recognizing that the fishing activities by the Alaska Packers Association would have an impact on the fish available to the Lummi Indians, nevertheless, refused to enjoin the operations of the fish traps. But the court did observe, *supra*, at 155-56 that to wholly deprive Indians of a chance to catch fish "* * * would certainly be an enfringement of the rights guaranteed to the Indians by the treaty."

3. "IN COMMON"—DICTIONARY DEFINITIONS

As previously indicated, the federal district court has concluded that "in common" means a division

into equal parts. We recognize that this Court in *Puyallup II*, 414 U.S. 44 provided that the allocation which must be devised is dependent upon a multiplicity of factors, *supra* at 48-49. However, since we are requesting a reconsideration of the allocation requirement, we should briefly discuss the dictionary definition of "common", which is the primary basis for the federal district court requirement of "equal sharing."[17]

The general definition of "in common" has not substantially changed since the Treaty of Medicine Creek in 1854. Compare an American Dictionary of the English language 231 (N. Webster 1862) with Websters' Third International Dictionary (1961). The 1862 Webster Dictionary defined common as follows:

> 1. *Belonging equally to more than one, or to many indefinitely;* as, life and sense are common to man and beast; the common privileges of citizens; the common wants of men.
>
> 2. *Belonging to the public;* having no separate owner. The right to a highway is common.
>
> 3. General; *serving for the use of all;* as the common prayer.
>
> 4. Universal; *belonging to all;* as, the earth is said to be the common mother of mankind.
>
> 5. *Public;* general; frequent; as, common report.
>
> * * * *A tract of ground, the use of which is not appropriated to an individual, but belongs to the public*, or to a number. Thus we

[17]We have previously noted the inequality of the "equal sharing", at pages ....-.....

> apply the word to an open ground or space in a highway, reserved for public use.
>
> 2. In law, an *open ground*, or that soil *the use of which belongs equally to the inhabitants* of a town or of a lordship, or to a certain number of proprietors; or the profit which a man has in the land of another; *or a right which a person has to pasture his cattle on land of another, or* to dig turf, or *catch fish*, or cut wood, or the like; called common of pasture, of turbary, of piscary, and of estovers. [Emphasis supplied]

All of these definitions with the exception of the first portion of number 1 denote a common public interest by many persons in the same thing, for example, a public park is frequently referred to as being a common area. The definitions do not lend themselves to the conclusion that a percentage of ownership interest is created in the natural resource. The trial court observed after making reference to *A New Abridgment of Law*, by Matthew Bacon (1793 pages 385 and 394) and an *American Dictionary of the English Language*, by Noah Webster 1828:

> that definition has as its clear thrust and impact that a right in common belongs to no one man but belongs equally to more than one, or to many indefinitely, as: life and sense are not common to man or beast, or: the common privileges of citizens, the common wants of man. That is, a right in common belongs to the public; it has no separate owner. (App. C-23)

This concept of having a common interest in the fish resource is consistent with the recognition by this Court that fish and game are a common resource for

all the citizens of the state. See, *Geer v. Connecticut*, 161 U.S. 519, 529 (1896), wherein the court stated:

> Whilst the fundamental principles upon which the common property in game rest have undergone no change, the development of free institutions have led to the fact that power to control lodged in the state resulting from this common ownership, is to be exercised like all other powers of government as a trust for the benefit of the people, and not as a prerogative for the advantage of government, or for the benefit of private individuals as distinguished from the common good * * * *the ownership is that of the people in their united sovereignty.* (Emphasis supplied)

Also see, *Patsone v. Pennsylvania*, 232 U.S. 138 (1914). All citizens share the right to exploit the common fisheries, subject only to reasonable conservation regulations.

4. "IN COMMON"—EQUAL PROTECTION

These treaties must be examined in light of the circumstances existing in the United States when the treaties were negotiated. We are referring to the fact that prior to the passage of the 14th Amendment to the United States Constitution (1865) there were substantial numbers of people residing within the United States who were not entitled to the constitutional protections that are now taken for granted.[18] Prior to the 14th Amendment, Indians without a treaty right could have been discriminated against by various forms of exclusionary legislation. In that

[18]See, *Dred Scott v. Sanford*, 9 Howard 393 (1857), holding that there were no constitutional rights available for members of the Black race.

context the term "in common with the citizens" provided for Indian fishing activities the equivalent of a 14th Amendment right to be free from discrimination. The fact that Indians subsequently became entitled to the 14th Amendment protections against discrimination does not detract from the fact that at the time of the treaty such equality was of great significance. At the time of the treaty the Indians were not citizens and some of the normal methods of obtaining citizenship were not available to them. See, *Cohen's Handbook of Federal Indian Law*, 154 (1971). The interpretation of the treaty as being an assurance of equal treatment of Indians, plus the absolute right of access to fishing locations as announced by this Court, *U.S. v. Winan*, *supra*, does not mean that the Indians were merely given something that they would have had without a treaty.

Some of the rights created by the Indian treaties may be nugatory due to subsequent events; that is, the current enjoyment by Indians of all of the rights of citizenship of the United States. This does not mean, however, that a court should under the guise of interpretation expand and rewrite a treaty beyond its clear meaning at the time it was executed. See, *Choctaw Nation of Indians v. U.S.*, 318 U.S. 423 (1943).

It is noteworthy that the most recent decisions involving interpretations of these Western Washington treaties by the United States Supreme Court approach the matter of Indian fishing on the basis of

equal protection and freedom from discrimination. *Puyallup I*, 391, U.S. 392, 402 (1968):

> Any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase "in common with."

Puyallup II, 414 U.S. 44 (1973):

> There is discrimination here because all Indian net fishing is barred and only hook and line fishing, entirely preempted by non-Indians is allowed.

We therefore submit that a proper interpretation of the Treaty of Medicine Creek permits the State upon a non-discriminatory basis affecting all citizens both Indian and non-Indian to equally apply conservation regulations meeting appropriate standards. Such regulations cannot deny the Indians access to usual and accustomed fishing places nor can they restrain Indian fishing at those places except to the same extent that the regulations restrain the fishing rights of all state citizens.

5. No Special Commercial Entitlements Conferred by Treaty

Commercial fishing at the time of the treaties was rudimentary in nature and not statistically measurable. The Indians' prime concern was with fishing as a food source although there was limited trading of fish among themselves and with settlers. At the time of the treaty the supply of fish was essentially considered to be inexhaustible because of the limited population available to consume the fish. The situation changed in the last decade of the nineteenth

century following the invention and perfection of the canning process which led to the large scale development of commercial fisheries in the State of Washington. That development and the increased demands on the fishing resource have resulted therefore in restrictions and controls by the State in the interest of conservation and for the effective use of the resource.

The Indians are afforded an equal opportunity to catch fish in the all citizen commercial and sports fisheries. Treaty Indians are not charged license fees or landing taxes on fishing at usual and accustomed places. A significant number of them do participate in the all-citizen fisheries, both sport and commercial. In these activities both Indians and non-Indians fish with identical gear and in the same locations at the same time and for the same purposes. To the extent that Indians avail themselves of that opportunity they are afforded an opportunity to catch a share of fish commensurate with their efforts. The treaty protection of access to the resource and the ability to participate on an equal basis with all other fishermen negates any need to construe the treaty as conferring some superior right to participate nor the decreeing of a percentage of the resource or a special right to participate on a commercial basis that is precluded to other fishermen.

In 1946 Congress created the Indian Claims Commission to adjudicate the United States' liability to Indian tribes or groups. (25 USC § 70a, et seq.)

The Indian Claims Commission for a number of years has been hearing and deciding claims submitted by Indian groups. Through those proceedings the Commission has had an extensive exposure to Indian law, anthropology, history of treaties, and construction of treaties. A number of claims have been by tribal groups residing in Western Washington. In light of the substantial experience of the Commission with reference to Western Washington Indians and its expertise in the area of Indian law, substantial weight should be given the construction of Indian treaties by the Indian Claims Commission.

The Makah tribe, which under its treaty (12 Stat. 939) which also contains a provision relating to taking fish "in common", sought compensation from the Federal Government for restrictions on the tribal halibut fishing and sealing activities. The Indian Claims Commission in *Makah Indian Tribe v. U.S.*, 7 Indian Claims Commission 477, at 508 (1959) stated:

> (3) The reserving of Makah fishing rights at usual and accustomed places under the 1855 Treaty was founded upon the need of the petitioner tribe to maintain its then subsistence economy which was based primarily upon the immediate products of the sea, *and in no sense was this treaty provision a guarantee of future commercial fishing rights.* (Emphasis supplied)

This expression by the Indian Claims Commission regarding no guaranteed future commercial fishing rights is consistent with the concern at the time of the treaty with access to fishing areas and subsistence

fishing. As the Indian Claims Commission has indicated there was no intention to secure to the Indians pre-eminent role in the commercial fishery that developed some 40 years after the treaty. *Also see Whitefoot v. United States*, 293 F.2d 658, 660, U.S. Court of Claims (1961).

CONCLUSION

The respondent Washington State Department of Game respectfully submits that this Court should continue to reject the jurisdictional objections which have continued to be raised by the petitioners throughout this fourteen year proceeding. A decision by this Court on the merits of the controversy will have a salutary effect upon the controversy in this area since it will reflect judicial finality on the issues.

In resolving this matter we would urge that the Court:

(1) Uphold the determination that hatchery fish are not subject to the treaty entitlement. The petitioners' reference to an anticipated long, expensive, time consuming trial in another forum to commence in 1978 can essentially be avoided or substantially shortened by this Court resolving this issue at this time.

(2) Affirm the State Court's exercise of jurisdiction to enforce the allocation of the steelhead harvest in the Puyallup River.

(3) Reconsider *Puyallup II*, 414 U.S. 44 and declare that the "in common" provision of the treaty, while it protects access to the resource and precludes

the imposition of license fees is in all other respects the equivalent of the equal protection clause of the Fourteenth Amendment.

(4) Affirm the determination by the State Supreme Court in *Puyallup I*, 70 Wn. 2d 245 that the Puyallup Reservation has been terminated and no longer exists.

As we have indicated, even if the Court concludes that the Puyallup Reservation has not been terminated, that determination does not moot these proceedings because the record clearly indicates that Puyallup Indians do fish for steelhead outside the boundaries of the area claimed to be the Puyallup Reservation.

DATED this 24th day of February, 1977.

Respectfully submitted,

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Attorney General,

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Deputy Attorney General,

Attorneys for Respondent Department of Game and the State of Washington

I hereby certify that on this 25th day of February, 1977, three copies of the Brief of Respondent Department of Game of the State of Washington were mailed, postage paid, to:

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counsel for petitioners. I further certify that all parties required to be served have been served.

EDWARD B. MACKIE
Deputy Attorney General
Temple of Justice
Olympia, Washington 98504

APPENDICES

10 Stat. 1132 (Treaty of Medicine Creek; Art. II and VI:

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the Shenah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

ARTICLE VI. The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said

Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

RCW 64.20.010 (§ 1, page 500, Laws of 1889-90):

SECTION I. That the said Indians who now hold, or who may hereafter hold, any of the lands of any reservation, in severalty, located in this state by virtue of treaties made between them and the United States, shall have power to lease, incumber, grant and alien the same in like manner and with like effect as any other person may do under the laws of the United States and of this state, and all restrictions in reference thereto are hereby removed.

27 Stat. 612 at 633-634:

That the President of the United States is hereby authorized immediately after the passage of this act to appoint a commission of three persons, and not more than one of whom shall

be a resident of any one State, and it shall be the duty of said commission to select and appraise such portions of the allotted lands as are not required for homes for the Indian alotees; and also that part of the agency tract, exclusive of the burying ground, not needed for school purposes, in the Puyallup Reservation, in the State of Washington, And if the Secretary of the Interior shall approve the sellections and appraisments made by said commission, the allotted lands so selected shall be sold for the benefit of the allottees, and the agency tract for the benefit of all the Indians, after due notice at public auction at not less than the appraised value for cash, or one-third cash, and the remainder on such time as the Secretary of the Interior may determine, to be secured by vendor's lien on the property sold.

It shall be the duty of said commission, or a majority of them, to superintend the sale of said lands, ascertain who are the true owners of the allotted lands, have guardians duly appointed for the minor heirs of any deceased allottees, make deeds of the lands to the purchasers thereof, subject to the approval of the Secretary of the Interior, which deeds shall operate as a complete conveyance of the land upon the full payment of the purchase money; and the whole amount received for allotted lands shall be placed in the Treasury to the credit of the Indian entitled thereto and the same shall be paid to him in such sums and at such times as the Commissioner of Indian affairs, with the approval of the Secretary of the Interior, shall direct: *Provided*, That the portion of the agency tract selected for sale shall be platted into streets and lots as an addition to the City of Tacoma, and sold in seperate lots, in the same manner as the allotted lands, and the amount received therefor, less the amount necessary to pay the

expenses of said commission, including salaries shall be placed to the credit of the Puyallup band of Indians as a permanent school fund to be expended for their benefit: *And provided further*, That the Indian allottees shall not have power of alienation of the allotted lands not selected for sale by said Commission for a period of ten years from the date of the passage of this act and no part of the allotted land shall be offered for sale until the Indian or Indians entitled to the same shall have signed a written agreement consenting to the sale thereof, and appointing said commissioners, or a majority of them, trustees to sell said land and make a deed to the purchaser thereof; and no part of the agency tract shall be sold until a majority of said Indians shall consent thereto in a written agreement, which shall also constitute said commissioners, or a majority of them, trustees to sell said land, as directed in this act, and make deeds to the purchaser for the same. The deeds executed by said commission shall not be valid until approved by the Secretary of the Interior, who is hereby directed to make all necessary regulations to carry out the purposes of the foregoing provisions. The proceeds arising from the sale of the allotted lands shall be placed in the Treasury to the credit of the respective allottees, and the net proceeds of the agency tract, after paying the expenses of said commission in the appraisment and sale of said lands, and reimbursing the United States for the amount advanced to said commission, shall be placed in the Treasury of the United States to the credit of all said Indians, and the said sums shall draw interest at the rate of four per centum per annum, and the income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior: *Provided;* That an amount not exceeding one tenth of the

principal sum may be expended for their benefit during any fiscal year, if deemed necessary by the Secretary of the Interior: *Provided further*, That the entire expense herein incurred shall be apportioned by the Secretary of the Interior pro rata between the several allottees and the owners of the tribal tract; and the Secretary of the Interior may in his discretion designate one member of said Commission to superintend the execution of any of the requirements of said Commission herein provided for.

And the sum of twenty thousand dollars or so much hereof as may be necessary, is hereby appropriated for the purpose of defraying the expenses of said commission, to be reimbursed to the United States out of the proceeds of the sale of that portion of the agency tract, to be immediately available.

SURVEYING AND ALLOTING INDIAN RESERVATIONS: Survey and subdivision of Indian reservations, and of lands to be allotted to Indians, and to make allotments in severalty, to be expended by the Commissioner of Indian Affairs under the direction of the Secretary of the Interior, twenty-five thousand dollars.

FIFE
INDUSTRIAL DISTRICT
TACOMA
DEVELOPMENT
PORT OF
MUNICIPAL TIDELANDS
AREA
TODD
CREEK
FIRWOOD
LAKEWOOD
WEBB CTR.
FEDERAL W
MIKHOR LAKE
WOODSTOCK
DASH PT.
BROWNS POINT

FOR ARGUMENT

Supreme Court, U. S.
FILED
APR 5 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-423

PUYALLUP TRIBE AND RAMONA BENNETT,
Petitioners,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,
Respondent,

On Writ of Certiorari to the Supreme Court of the State of Washington

REPLY BRIEF FOR THE PUYALLUP TRIBE AND RAMONA BENNETT

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REPLY BRIEF FOR THE PUYALLUP TRIBE AND RAMONA BENNETT

This brief replies to the briefs of Respondents Department of Game [hereinafter Game brief], Northwest Steelheaders Council of Trout Unlimited and Gary Ellis [hereinafter Steelheaders Brief], and of the Amici Curiae Purse Seine Vessel Owners Association, Puget Sound Gillnetters Association, West Coast Trollers Association, and the Northwest Trollers Association [hereinafter Amici Brief]. Our reply conforms to the format of our opening brief.

I

State Administrative Agencies and Courts Are Without Power to Adjudicate Tribal Entitlement to On-Reservation Fisheries and To Enforce The Decrees

The state chooses, at this late date, to make its principal stand by arguing that the Puyallup Reservation does not exist rather than contesting directly the proposition that state authorities lack power to regulate the tribal fishery on the reservation. Game Brief at 31-49. The existence of the reservation, however, was conceded by council throughout the trial,[1] recognized as fact by the trial court, FF XVI, Pet. Cert. App. D-17, and by the Washington Supreme Court in its decision under review here. 86 Wn.2d 664, 668, 548 P.2d 1058, 1063, Pet. Cert. App. B-6-7; *see id.* at 688-89, 548 P.2d at 1074, Pet. Cert. App. B-45 (Stafford, C.J., with Wright, Utter & Horowitz, J.J., concurring). Indeed, the whole matter was settled by the separate reservation decision of the Ninth Circuit, *United States* v. *Washington,* 496 F.2d 620 (9th Cir.), *cert. denied.* 419 U.S. 1032 (1974), compiled on a record containing a great deal more than what counsel chooses to present for the first time in this proceeding.[2] *See* Game Brief at 33-49.

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[1] App. 20-21 ("Mr. Mackie: . . . [W]e have to operate on the premise that there is a reservation unless the United States Supreme Court grants certiorari on [the Ninth Circuit reservation decision] and reverses the same." Certiorari was denied. 419 U.S. 1032 (1974)); R. 1136 ("Mr. Mackie: . . . [W]ith reference to the reservation I should clarify, the State is now in a position of having a decision against it by the 9th Circuit which we believe is in error but at this stage of course we're bound by it."). Nowhere in its brief before the Washington Supreme Court did the Department of Game assert that the reservation had been terminated.

[2] United States v. Washington, No. 39-71C3 in the district court, was tried on a record consisting, among other things, of a 48-page, 214 paragraph Plaintiff's Request for Admissions detailing a complete history of the Puyallup Reservation.

Nor does the record permit a factual escape from the proposition that we are dealing with an on-reservation Indian steelhead fishery. The trial court found as a fact that the tribe intends to concentrate its fishery within the boundaries of the reservation, Pet. Cert. App. D-17, and the only testimony on the point is that 90-100 percent of all future harvests will be on the reservation (App. 79-80); *cf. DeCoteau* v. *District County Court,* 420 U.S. 425, 428-30 & n.3 (1975). None of the Indian net fishing for the 1973-74 season here at issue occurred off the reservation. *Compare* R. 485 *with* the map appearing in the Game Brief at 75. *See also* App. 79-80; R. 826. The correct factual hypothesis, accepted by the state Supreme Court and beyond contradiction here, is that "substantially all" of the Indian catch of steelhead occurs on-reservation. 86 Wn. 2d at 688, 548 P.2d at 1074, Pet. Cert. App. B-45 (Stafford, C.J., with Wright, Utter, & Horowitz, J.J., concurring); *see id.* at 668-69, 548 P.2d at 1063, Pet. Cert. App. B-6-7.

With the reservation established and the fishery fixed on the reservation, Respondents are skewered decisively by the propositions that Article II of the Treaty of Medicine Creek reserved exclusive fishing rights on the reservation to the tribe and that the state lacks power to regulate an on-reservation fishery. *See* Opening Brief for the Puyallup Tribe and Ramona Bennett 20-26. It is suggested (Game Brief at 48-49) that the Public Law 280 prohibition against state adjudication of tribal treaty fishing rights can be overcome by the simple expedient of declaring more than three-fourths

of the harvestable fish in the river exempt from the treaty. This exercise in circularity reduces the rights, "control and regulation" promised by Public Law 280 to the tribe *pro tanto* to the extent the state chooses to withhold it. Nor is the case for state power enhanced by citation (Game Brief at 47) to the opinion in *United States* v. *Finch,* 395 F. Supp. 205 (D. Mont. 1975), holding that the Big Horn River crossing the Crow Reservation is not Indian trust land for purposes of fishing regulation, for the simple reason that the Court of Appeals reversed on precisely this point. —— F.2d ——, No. 75-2149 at 14-16 (9th Cir. Dec. 22, 1976), *petition for cert. filed,* 45 U.S.L.W. 3619 (U.S. Mar. 15, 1977) (No. 76-1206). *See also Quechan Tribe* v. *Rowe,* 531 F.2d 408, 410 (9th Cir. 1976). All this overlooks the further proposition, equally decisive, that the State of Washington and the Game Department have litigated and lost the issue of tribal control of the on-reservation fishery. *See* Opening Brief of the Puyallup Tribe and Ramona Bennett 35-38.[3]

II

Indian Fishing, Even When Off-Reservation, Can Be Curtailed by the State Only Upon a Compelling Justification of Conservation Necessity

Neither decision below purports to justify the assumption of on-reservation regulatory powers and the allocations decreed as instances of conservation neces-

[3] The law of the case argument on the reservation status, also raised here for the first time (see Game Brief at 45-46), founders on the proposition that the existence of the reservation was pretermitted expressly by this Court in *Puyallup I.* 391 U.S. at 394 n.1; *see* Satiacum v. Washington, 414 U.S. 44 (1973). *See also* Hartford Life Ins. Co. v. Blincoe, 255 U.S. 129, 136 (1921); 1B Moore's Federal Practice ¶ 0.404[10], at 572-73.

sity within the meaning of *Antoine* v. *Washington,* 420 U.S. 194, 207 (1975). The record on this score, in an exhibit prepared by the Game Department (Exh. 74-2, App. 93; *see* R. 148-49, 170-74), scarcely could be clearer: the total Indian steelhead catch on the Puyallup River during the period 1953-1973 (including some years when injunctions were in effect) amounted to 28,328, an average of 1416 fish per year. The sportsmen have caught approximately 11,058 fish per year. The 1400 or so fish per year taken by the Indians averages out to a little more than 10 percent of the harvestable steelhead on the river as computed by the trial court (FF XII, Pet. Cert. App. D-14-15) or 20 percent of the harvestable natural steelhead computed by the trial court (*Id.*). In a single year (1960) by a small margin (approximately 1,200 fish) the Indian catch exceeded the annual catch figure for the tribe (3310 or 3280) fixed initially by the trial judge. *See* FF XXII, Pet. Cert. App. D-19, Order and Judgment, Pet. Cert. App. E-3. This empty conservation threat recedes still further if the issue is seen [4] as whether a virtually nonexistent off-reservation fishery must be controlled for conservation reasons.

These catch figures are not overcome by unsupported assertions of tribal overfishing [5] or by snippets of record references (*see* Steelheaders Brief at 23-26) that are either miscast or now thoroughly stale. *See* Opening Brief for the Puyallup Tribe and Ramona Bennett at 11-13. The further argument pressed by the

[4] As it properly is, *see* Puyallup Tribe v. Department of Game, 391 U.S. 392, 399 (1968).

[5] There is considerable evidence in the record confirming the tribe's commitment to conservation. R. 1103-04, 802; App. 79, 83; Exh. 74-P; 74-Q; *see* R. 489.

Steelheaders (Brief at 26-30) and the state (Game Brief at 49-50), that the resource must be protected against multiple management, is simply another way of saying the reservation status is meaningless and tribal authority over on-reservation fishing is subject to the good will and heavy hand of state domination. That is also another way of repudiating the specific commitments of the Treaty of Medicine Creek and the general commitment of the Congress to principles of tribal self-government. *See* Opening Brief of Puyallup Tribe and Ramona Bennett at 22-24.

III

Tribal Sovereign Immunity Precludes State Courts From Adjudicating Tribal Community Fishing Rights

The tribe's sovereign immunity arguments (Opening Brief at 31-35) are neither distinguished, refuted, nor scarcely addressed by Respondents. The reason is that the tribe's objections are unanswerable. The Game Department does assert that the State "is seeking to determine the extent to which it can apply its regulatory powers with relation to fishing activities by individual members of the Puyallup Tribe. When the scope of that power has been defined, the State can then seek remedies against individual Indian fishermen who violate those regulations." Brief at 19. Yet, the relief sought and secured in this case has been aimed solely at the tribe and its chief executive officer. The original Order and Judgment allocates the community fishery and directs the tribe to file a list of fishermen and make reports. Pet. Cert. App. E 2-5. In the exercise of its continuing jurisdiction, the Pierce County Superior Court has issued a series of orders aimed at the tribe and the tribal council. *See* Opening Brief at 8-9. The

effect is to subject the tribe itself and its officials, and their powers as regards the tribal fishery, to the continuing mandates of the Superior Court. The state need never again seek relief against individual fishermen when the same result can be achieved by ordering the tribe, under threat of contempt for its officers, to close the fisheries. Subjecting the tribe to suit on these grounds offends settled principles of sovereign immunity. *E.g., United States* v. *United States Fidelity & Guaranty Co.,* 309 U.S. 506, 512 (1940).

IV

The State and the Game Department Are Barred by Principles of Collateral Estoppel from Relitigating the Issue of State Power to Regulate On-Reservation Fishing

Respondents' and the amici's briefs demonstrate, far more convincingly than simple assertions by the tribe, an unswerving determination to reargue a wide variety of propositions decided adversely to them by various courts in recent years. This Court is asked to reexamine the decision in *Department of Game* v. *Puyallup Tribe* (II), 414 U.S. 44 (1973) (Game Brief at 51), for no discernible reason other than a change in membership of the Court, to reopen the Puyallup Reservation case, *United States* v. *Washington,* 496 F.2d 620 (9th Cir.) (per curiam), *cert. denied,* 419 U.S. 1032 (1974), without benefit of the record compiled there, and to reject, again without benefit of a record, most of the legal premises of Judge Boldt's rulings in *United States* v. *Washington,* 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976).

Simply put, the facts are that prior to the Superior Court decision in the instant case federal courts, on

two occasions where the state was a party, ruled that state agencies lacked power to regulate on-reservation fishing. This was true in Judge Boldt's case (384 F. Supp. at 341) and in the Ninth Circuit's reservation decision (496 F.2d at 620) where it can safely be said that the chief issue in the case involved tribal power to regulate the Puyallup River steelhead fishery. Notwithstanding these prior adjudications, the State Superior Court (Pet. Cert. App. C-51) and Supreme Court in turn (86 Wn.2d at 669, 548 P.2d at 1063, Pet. Cert. App B-7) approved on-reservation regulation of the tribal steelhead fishery.

The principles of repose represented by res judicata and collateral estoppel, expressed as full faith and credit in the interstate context, 28 U.S.C. § 1738, surely put a halt to the relitigation attempted here. *See Kalb* v. *Feuerstein,* 308 U.S. 433, 440 & n.12 (1940); *Stoll* v. *Gottlieb,* 305 U.S. 165, 172 (1938); R. Cramton, D. Currie & H. Kay Conflict of Laws 659 (2d ed. 1975). The reservation question is closed and along with it the state's power to regulate within the reservation boundaries. The Steelheaders suggest (Brief at 30) that as nonparties they can litigate anew the question of reservation status. The law is to the contrary, *see City of Tacoma* v. *Taxpayers,* 357 U.S. 320, 340-41 (1958), and for good and sufficient policy reasons. If a ruling against the state did not foreclose objections by private citizens, Indian tribes would be perpetually on the defensive rearguing issues of tribal or reservation status. Indeed, the complaint filed in the reservation case in the federal courts named one sportsmen's group as a defendant (note 2, *supra*), only to have two others emerge in this case (including the Steelheaders) to reargue the reservation issues.

V

The Issue of Treaty Entitlement to Hatchery Steelhead Is Not Before the Court and Is Unnecessary to the Decision

We interpret the Steelheaders' Brief (at 14, 18-19, A1-A3) charitably as expressing annoyance at the tribe for not seeking certiorari on the issue of treaty entitlement to hatchery steelhead while conceding that as a prevailing party it could not have sought review here. *See New York Telephone Co.* v. *Maltbie,* 291 U.S. 645 (1934). The various reasons advanced by Respondents in support of the argument that this Court should review an issue not raised in the Petition add up to the proposition that the question of treaty entitlement to hatchery fish is important, which none would deny. Indeed, the issue is so important that it manifestly should not be decided on this record sharply curtailed by the scope of the issues (a single species on a single river) and by repeated evidentiary rulings curtailing tribal evidence relevant to the disposition. *See* Opening Brief for the Puyallup Tribe and Ramona Bennett at 39-40. *Compare* Exh. 74-I *with* R. 1137-39 (excising from the exibit those pages dealing with environmental damage to the river).[6] Nor, decisively, should the issue be reviewed on a record compiled by a state court without power to make the decision.

Respondent Steelheaders take offense also (Brief at 14) at the decision of the district court of the Western

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[6] As counsel for the Steelheaders put it to the trial court:

> [W]e are here concerned with a remand concerning the Puyallup River system. It is irrelevant to the Puyallup River system what may have been done on the Columbia River or other places involved in the Pacific Northwest.

R. 702; *see* R. 324, 328, 703, 717, 991-92, 996, 1002.

District of Washington of August 13, 1976, granting a preliminary injunction against state officers restraining them from excluding hatchery reared fish from tribal allocations pending a full trial in Phase II of the *United States* v. *Washington* litigation. *See id.,* App. A-8 to A-9. Apart from misstating the possible collateral estoppel effect of the instant litigation on the Puyallup Tribe in that proceeding,[7] Respondents are asking this Court to prejudge not only the propriety of the August 13, 1976 injunction, from which an appeal has been taken by the state,[8] but also major aspects of the Phase II litigation yet to be tried. This is consistent with Respondent's view of this case as a vehicle for undoing all of the legal damage done to them by numerous courts in the last several years.

Amici commercial fishermen point out (Brief at 10-15) certain conflicts between federal and state decisions on various Indian fishing issues. This happens to be true although many of the conflicts were occasioned

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[7] The August 13, 1976 memorandum decision of the district court does recite at length the repeated rulings at trial in the instant case excluding tribal evidence pertinent to the natural-hatchery issue (*Id.* at 11-12). The court holds that the Puyallup Tribe would not be foreclosed by *res judicata* from litigating legal issues regarding environmental degradation of the watershed and treaty entitlement to hatchery fish (CL-8 at 26) and concludes (CL-9 at 26):

> To the extent that the Puyallup Tribe may be collaterally estopped from litigating before this Court fact issues actually litigated during the *Puyallup III* trial (for example, questions concerning the historic sizes of the natural and hatchery steelhead runs on the Puyallup River and the sources of funding for those runs), the issues are best decided as they arise during pending Phase II litigation.

[8] United States v. Washington, No. 76-3757 (9th Cir.), filed October 8, 1976.

by suits against state agencies by commercial fishing interests seeking to attack collaterally the decisions of the federal district court. Various issues in these controversies are now before the courts,[9] and none of them are remotely presented here. The further suggestion by Amici (Brief at 7-10) that this Court ought to proceed, willy-nilly as it were, to exclude hatchery reared salmon from the reach of all Indian treaties is bold even by the standards of this case since there is neither a pleading nor shred of evidence in the record addressing treaty entitlement to hatchery reared salmon. Lastly, amici suggest (Brief at 16-17) that the Puyallup Tribe already has argued here the issue of treaty entitlement to hatchery steelhead, which manifestly we have not done, and will not do so, unless the Court advises us that the normal rules for the presentation of questions are suspended in Indian fishing cases.

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[9] United States v. Washington, Nos. 75-2835, 76-1042 (9th Cir.) (raising the question, among others, whether a state agency can resist compliance with federal court orders on the ground that state law precludes the closure of fisheries for any reason other than conservation (i.e., to allow sufficient escapement to the Indian fishing grounds)); Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 87 Wn. 2d 417, 553 P.2d 113 (1976), *rehearing granted,* Nov. 4, 1976.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Washington should be reversed with directions to dismiss.

Respectfully submitted,

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No. 76-423

In the Supreme Court of the United States

OCTOBER TERM, 1976

PUYALLUP TRIBE, INC., AND
RAMONA BENNETT, PETITIONERS

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted pursuant to the Court's invitation in its order of November 29, 1976.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington (Pet. App. B-1 to B-66) is reported at 86 Wash. 2d 664, 548 P.2d 1058. The opinion of the Superior Court of the State of Washington in and for Pierce County (Pet. App. C-1 to C-59), together with findings of fact and conclusions of law (Pet. App. D-1 to D-24), is not reported.

JURISDICTION

The judgment of the Supreme Court of the State of Washington became final on June 25, 1976 (Pet. App. B-67 and B-68). The petition for a writ of certiorari was filed on September 22, 1976, and granted on November 29, 1976. The jurisdiction of this Court rests upon 28 U.S.C. 1257(3).

QUESTION PRESENTED [1]

Whether the Washington state courts may limit the right of the Puyallup Indian Tribe to fish for steelhead trout within the boundaries of the Puyallup Indian Reservation.

TREATY INVOLVED

The Treaty of Medicine Creek, 10 Stat. 1132, December 26, 1854, is set forth in pertinent part at 1a-2a of the Attachment to petitioners' brief.

STATEMENT

In 1963 the Department of Game and the Department of Fisheries of the State of Washington brought an action in state superior court against the Puyallup Tribe and various individual tribal members, claiming that they were subject to state fishing laws pro-

[1] Although the Washington Supreme Court decided several issues relating to the fishing rights of the Puyallup Indians, the petition for a writ of certiorari filed by the Puyallup Tribe raised only the issue whether the state courts may exercise control over the right of the Puyallup Tribe to fish for steelhead trout on its Reservation.

hibiting net fishing at their usual and accustomed places outside the Reservation.

The trial court held that the Puyallup Tribe no longer existed as an entity; that its members therefore no longer possessed treaty fishing rights; and that there was no longer a Puyallup Reservation. The court also held that it was reasonable and necessary that state conservation rules and regulations be uniformly applied to all citizens.

On appeal, the Washington Supreme Court held that the trial court lacked jurisdiction to determine that the Tribe had been terminated; that, although there was no longer a Puyallup Reservation, the tribal members continued to have a right to fish at usual and accustomed grounds; and that any regulations of the Departments limiting or restricting those rights must be reasonable and necessary for the preservation of the fisheries. Under the circumstances, the court concluded, the injunction entered by the trial court to limit Indian fishing was too broad. The Washington Supreme Court therefore set aside the judgment and remanded the cause. *Department of Game* v. *Puyallup Tribe, Inc.*, 70 Wash. 2d 245, 422 P.2d 754.

This Court, on certiorari to the Washington Supreme Court, affirmed. *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392 (*Puyallup I*). The Court held that, although the State could not qualify the Indians' treaty right to fish "at all usual and accustomed places," the State could regulate the manner of fishing and the like "in the interest of con-

servation, provided the regulation meets appropriate standards and does not discriminate against the Indians." 391 U.S. at 398. The Court did not decide whether the State's prohibition against the use of set nets in fresh water was "reasonable and necessary" for purposes of conservation. This was an issue that the State Supreme Court had left for the trial court on remand. *Id.* at 401-402.

Prior to the trial on remand, the Department of Fisheries promulgated salmon regulations limiting commercial net fishing but permitting Indian net fishing for salmon in the Puyallup River. The Department of Game, however, refused to recognize a treaty right to a commercial steelhead fishery and continued its total prohibition on net fishing for steelhead trout. After a hearing, the trial court dissolved its prior injunction on the grounds that the Department of Game had not met its burden of showing that its regulations were reasonable and necessary for the conservation of the fishery and that the Department had made no showing of irreparable injury. On appeal, the Washington Supreme Court, in *Department of Game* v. *Puyallup Tribe, Inc.*, 80 Wash. 2d 561, 497 P.2d 171, reinstated the injunction against Indian net fishing for steelhead trout.

This Court reversed. *Washington Game Department* v. *Puyallup Tribe*, 414 U.S. 44 (*Puyallup II*). Reviewing the validity of regulations of the Department of Game that banned net fishing for steelhead trout, the Court held those regulations invalid because they discriminated against the Indians. All

Indian net fishing being barred, the steelhead were being taken solely by hook and line fishing, which was entirely preempted by non-Indians. The Court observed that the State need not prohibit all net fishing but could make regulations fairly allocating the steelhead between Indians with nets and non-Indians, while still providing the number necessary for escapement. 414 U.S. at 48-49.

During this same period, two cases involving tribal fishing rights were proceeding in the federal courts. In *United States* v. *State of Washington*, 496 F.2d 620 (C.A. 9), certiorari denied, 419 U.S. 1032, the Court of Appeals for the Ninth Circuit held that, although ownership of the land had largely passed from Indian hands, the Puyallup Indian Reservation nonetheless continued in existence. As a result, the court indicated, tribal members had a continuing right to fish free from state interference on that portion of the Puyallup River lying within the reservation (*ibid.*).[2] That decision was rendered on April 30, 1974.

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[2] The court of appeals stated (496 F.2d at 620):

> This appeal presents for decision, a contention under which the appellee challenges the continued existence of the Puyallup Indian Reservation and, as a consequence, the right of the Puyallup Tribe of Indians to fish, free from state interference, on that part of the Puyallup River lying within the Reservation [footnote omitted].

The court then concluded, on the basis of *Mattz* v. *Arnett*, 412 U.S. 481, that "the Puyallup Indian Reservation continues to exist" (496 F.2d at 621).

The Puyallup Tribe and the State of Washington were also involved in litigation in the United States District Court for the Western District of Washington. *United States* v. *State of Washington*, 384 F. Supp. 312, affirmed, 520 F.2d 676 (C.A. 9), certiorari denied, 423 U.S. 1086. In that case, brought by the United States to require the State to observe fishing rights guaranteed by treaty to numerous tribes including the Puyallup Tribe, the district court held, *inter alia*, that on-reservation fishing is not subject to state regulation (384 F. Supp. at 341) and that the Tribes were entitled to an opportunity to catch 50 percent of the harvestable steelhead run off their reservations (384 F. Supp. at 343). The district court rendered its decision on February 12, 1974.[3]

On April 8, 1975, after these federal decisions had been handed down, the state superior court in the instant case issued its decision curtailing the Tribe's right to capture steelhead both on and off the Reservation. The court recognized, as had this Court in *Puyallup I*, that the Department of Game has the authority to regulate the off-reservation fishing activities of the Puyallup Tribe when such regulations are necessary for the purposes of conservation. The court further held, however, that it had jurisdiction to allocate the fishery of both hatchery and naturally propagated steelhead within the boundaries of the Reserva-

[3] The court of appeals affirmed on June 4, 1975, and then amended its opinion in part on July 23, 1975.

tion (Pet. App. C-47). As to the allocation question, the court found that the Puyallups are entitled to 45 percent of the harvestable natural steelhead run in the Puyallup River (not to exceed 3,280 steelhead per year) and that Indians within such limits are entitled to fish with nets and to sell the fish commercially (Pet. App. C-57 to C-58). The court held that the Tribe had no treaty right to hatchery produced steelhead released by the Department of Game (Pet. App. C-52).

The Supreme Court of Washington, with slight modifications, affirmed. The court first held that the state courts had jurisdiction to determine the extent of Indian exemption from state regulations due to overriding federal treaty rights and that it was not necessary to defer on that question to the federal courts (Pet. App. B-5 to B-8). The court then retreated from its earlier decision (in *Puyallup I*) recognizing an Indian net fishery as a matter of right under the Treaty of Medicine Creek and suggested that the finding should be re-examined by this Court as well (Pet. App. B-8 to B-32). Holding that the State Department of Game must exercise continuing jurisdiction over Indian steelhead fishing, the court ruled that, for purposes of conservation, regulations applicable equally to Indians and non-Indians may be imposed; that the State may not interfere with access by Indians to their usual and accustomed fishing places; that the award of 45 percent of the harvestable natural run as the extent of the Indians' treaty right was an equitable determination by the

trial court (Pet. App. B-40); and that hatchery-produced fish are not subject to Indian treaty fishing rights (Pet. App. B-33 to B-37).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Puyallup Indian Reservation, created by the Treaty of Medicine Creek (10 Stat. 1132), encompasses within its boundaries a portion of the Puyallup River. As this Court noted in *Puyallup I* (391 U.S. at 395), steelhead trout "come in from the ocean, pass through the salt water of Puget Sound, enter the fresh waters at the mouths of rivers [including the Puyallup River], and go up these rivers to spawn." As they proceed upriver to their spawning grounds, therefore, the steelhead trout pass through waters of the Puyallup River within the Puyallup Indian Reservation. This case involves the right of the Puyallup Indians to fish for such steelhead trout within their Reservation free of state regulation and control.

This case differs markedly from *Puyallup I* and *Puyallup II* in several respects. Salmon fishing, at issue in *Puyallup I* (but not *Puyallup II*), is not at issue here. Nor does this case involve, as did both *Puyallup I* and *Puyallup II*, regulation of fishing by individual tribal members outside the Reservation; the Tribe has challenged in its petition for certiorari only the regulation by the Department of Game of tribal fishing within the Puyallup Reservation. Indeed, the Department of Game named only the Tribe

and its Chairperson as defendants in the State Superior Court. In addition, important decisions in two federal cases, rendered after this Court's decision in *Puyallup II* and before the judgment of the Superior Court in this case, have affirmed the existence of the Puyallup Reservation and declared the Indians' right to fish on the Reservation without State interference.

It is the position of the United States that the Washington state courts improperly exercised jurisdiction over the Puyallup Tribe in this case and that, in any event, principles of collateral estoppel and *res judicata* barred the state courts from adjudicating the Tribe's right to fish on its Reservation. On the merits, we believe that the Tribe's right to fish on its Reservation has been preserved free from State regulation by the Treaty of Medicine Creek. Moreover, even if the Tribe were to exceed the rights granted by the Treaty, the State of Washington cannot govern the activities of the Tribe on its Reservation; the United States, in the exercise of its guardianship over the Indians, has that power and responsibility.

The sovereign immunity of the Puyallup Tribe protects it from suit at the behest of the Department of Game (*United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506). The present suit, unlike the underlying suits in *Puyallup I* and *Puyallup II*, is directed at the Tribe alone and does not concern off-reservation fishing activities by individual tribal members. The order of the State Superior Court im-

poses obligations and restrictions directly upon the Tribe, including a restriction on the number of steelhead trout that may be taken within the boundaries of the Puyallup Reservation. This order is incompatible with the immunity granted to the Tribe as a "dependent * * * sovereignt[y]" (*United States* v. *United States Fidelity & Guaranty Co., supra*, 309 U.S. at 512).

In any event, principles of *res judicata* and collateral estoppel bar relitigation of issues previously resolved by judgments in federal cases. The Court of Appeals for the Ninth Circuit has held that the Puyallup Reservation continues in existence and indicated that the Tribe is thus free to fish upon the Reservation without state interference (*United States* v. *State of Washington*, 496 F.2d 620, certiorari denied, 419 U.S. 1032). More importantly, the decision of the United States District Court for the Western District of Washington, in a case involving both the Puyallup Tribe and the Department of Game, established allocation formulas applicable to off-reservation fishing and concluded that tribal fishing on the Reservation was not subject to state regulation (*United States* v. *State of Washington*, 384 F. Supp. 312). The Court of Appeals for the Ninth Circuit affirmed that decision (520 F.2d 676), and this Court denied certiorari (423 U.S. 1086). Those judgments are binding upon the state courts under the Full Faith and Credit Clause and principles of *res judicata* and collateral estoppel.

The remand from this Court in *Puyallup II*, a case involving only off-reservation fishing by individual Indians, did not render these principles ineffective. The opinion of the Court in that case gives no indication that the state courts were to exercise jurisdiction over on-reservation fishing for steelhead trout regardless of intervening federal judgments. Nor does the presence of the plaintiff-intervenors call for a different outcome. To the extent that they did not have the opportunity to present arguments in the federal cases, their interests were amply represented by the State of Washington and the Department of Game.

For the foregoing reasons, we do not think it necessary for the Court to reach the merits of this case. Should it do so, we believe that Article II of the Treaty of Medicine Creek (10 Stat. 1132), setting apart Reservation lands for the "exclusive use" of the Indian tribes, preserved for the Puyallup Tribe the right to take fish upon the Reservation without regulation by the State. Given the importance of fishing rights to Indian tribes in 1854 (*Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 405-406) and the plentiful supply of fish at that time, the Puyallup Tribe can hardly be thought to have surrendered to future white settlers the power to regulate its fishing activities upon the Reservation. Although circumstances have changed significantly in the past 123 years, the State may not now limit by regulation the rights conferred to the Tribe by federal treaty.

The State of Washington has no inherent jurisdiction over the Puyallup Indians upon their Reservation (*Bryan* v. *Itasca County*, 426 U.S. 373, 376-377, n. 2). Although this Court has permitted limited exercise of state jurisdiction over matters involving Indians off their Reservation and over matters involving non-Indians, the activities in this case fall into neither category; rather, the State seeks to regulate tribal activity on the Reservation that it suspects may affect non-Indians outside the Reservation. This substantial interference with tribal sovereignty finds no warrant in the decisions of this Court.

The federal government, in the exercise of its plenary power over the Indian tribes, can oversee proper exercise of the Indians' treaty rights. And the State, of course, may reach an accommodation with the Tribe through appropriate bargaining. What the State may not do, in our view, is unilaterally to impose regulations on the Puyallup Tribe within the borders of its Reservation and thus make the Tribe's exercise of its treaty rights subject to continuing state control.

ARGUMENT

I. THE STATE SUPERIOR COURT LACKED JURISDICTION OVER THE PETITION FOR RELIEF BECAUSE OF THE SOVEREIGN IMMUNITY OF THE PUYALLUP TRIBE.

The Amended Petition for Declaratory Relief, filed by the Department of Game on January 9, 1974, following remand after the decision in *Puyallup II* (App. 3), names as defendants only the Puyallup

Tribe, Inc. and Ramona Bennett, Chairperson of the Tribal Council. The complaints filed by the plaintiffs-intervenors are directed to the same defendants. Not surprisingly, therefore, the relief awarded by the state superior court (and substantially affirmed by the Washington Supreme Court) generally runs against the Tribe: the Tribe is directed to submit a roll of authorized fishermen; the Tribe is required to report on a weekly basis the take of the Tribal members; and, most importantly, the take of the Tribe within the boundaries of its Reservation is limited by the allocation formula developed by the superior court. Moreover, the state courts have denied the Tribe and its members any right to take hatchery fish that pass through the Puyallup Reservation (Pet. App. E-2 to E-5).

The principle is well-established that Indian tribes enjoy sovereign immunity from suit absent a clear waiver. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506. Once themselves regarded as sovereign nations,[4] Indian tribes traditionally have been protected by principles of immunity similar to those applicable to the several States. See, *e.g.*, *Thebo* v. *Choctaw Tribe of Indians*, 66 Fed. 372 (C.C.A. 8). Under normal circumstances, and without clear waiver, those principles would protect an Indian tribe from being haled into state court, at the behest of a state agency, and or-

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[4] See *Worcester* v. *Georgia*, 6 Pet. 515 (Marshall, C.J.); *United States* v. *Devonian Gas and Oil Co.*, 424 F.2d 464 (C.A. 2) (Friendly, J.).

dered to forego rights believed to have been secured in a treaty with the United States.

The Washington state courts in this case asserted jurisdiction over the Puyallup Tribe apparently upon two grounds.[5] First, the Washington Supreme Court (Pet. App. B-6) found persuasive the language of this Court in *Puyallup I*, rejecting a sovereign immunity defense: "This case, however, is a suit to enjoin violations of state law by individual tribal members fishing off the reservation. As such, it is analogous to prosecution of individual Indians for crimes committed off reservation lands, a matter for which there has been no grant of exclusive jurisdiction to federal courts" (391 U.S. at 397, n. 11). The present suit, however, as a reading of the petition for relief shows, is not "a suit to enjoin violations of state law by *individual* tribal members" (emphasis added), none of whom is named as a defendant in the petition, nor is it a suit involving only "fishing *off* the reservation" (emphasis added). Rather, the suit is directed in large part at controlling the activi-

[5] Although it does not appear that the Tribe raised the defense of tribal sovereign immunity in its answer, we believe that this defense, like the Eleventh Amendment defense, "sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court" (*Edelman* v. *Jordan*, 415 U.S. 651, 678).

The Washington Supreme Court apparently assumed that the Tribe was subject to suit; the pertinent question in its view was whether federal treaty rights could be determined in State court (Pet. App. B-5). In this brief we discuss the positions taken by the Washington Supreme Court insofar as they may pertain to the issue of sovereign immunity as well.

ties of the Puyallup Tribe itself (and presumably its members at least indirectly) both off and on the Reservation in a manner not contemplated during the proceedings under review in *Puyallup I*.

The second basis for assuming jurisdiction over the Tribe was the remand from this Court in *Puyallup II*. But *Puyallup II*, like its predecessor, involved fishing by individual tribal members off the Reservation. Although the Tribe (as in *Puyallup I*) was named as a defendant, the sole question before this Court was the extent of off-reservation fishing rights exercisable by tribal members in common with non-treaty fisherman in Washington. Nothing in these prior cases placed obligations upon the Tribe itself or in any way restricted the right of the Tribe to conduct fishing operations within the confines of its Reservation.

The fact that individual fishing rights are generally derived from, and dependent on, tribal fishing rights is, under these circumstances, not relevant to the question of sovereign immunity. A State may sue individual tribal members to regulate their off-reservation conduct under non-discriminatory fishing regulations held necessary for conservation and compatible with Tribal treaty rights; but it does not follow that the Tribe itself must answer in State court for the extent of its on-reservation fishing and, in addition, submit lists and reports to assist state regulation off the Reservation. Whatever may be the obligation of individual Indians to respond to state process, the Tribes, as "dependent * * * sovereignties"

(*United States* v. *United States Fidelity & Guaranty Co.*, *supra*, 309 U.S. at 512), are not subject to suit at the behest of a State or private parties. Thus, the exercise of judicial power over the Tribe in this case is incompatible with recognized principles of Tribal sovereign immunity.

II. ESTABLISHED PRINCIPLES OF RES JUDICATA AND COLLATERAL ESTOPPEL BAR RELITIGATION OF THE PRINCIPAL ISSUES IN THIS CASE.

If the Tribe's immunity from suit did not bar the Washington state courts from deciding the scope of the Indians' fishing rights, we believe these issues are nevertheless foreclosed, under principles of collateral estoppel and *res judicata*, by the decision of the United States District Court for the Western District of Washington in *United States* v. *State of Washington*, 384 F. Supp. 312, affirmed, 520 F.2d 676 (C.A. 9), certiorari denied, 423 U.S. 1086.

Despite the complex history of this litigation, and the related federal litigation, the facts giving rise to application of principles of *res judicata* and collateral estoppel are relatively straightforward. On January 9, 1974, after the remand from this Court in *Puyallup II*, and the subsequent remand to the state superior court from the Washington Supreme Court, respondent Department of Game there filed an Amended Petition for Declaratory Relief. Shortly thereafter, on February 12, 1974, Federal District Judge Boldt entered his decision in *United States* v. *State of Washington*, *supra*, upholding the right of

the Puyallup Tribe to take 50 percent of the harvestable steelhead in off-reservation fishing sites recognized by the Treaty of Medicine Creek. Judge Boldt also held that fish taken by the Tribe on the reservation were not subject to regulation by the State and were not to be counted in the Tribe's specified share. On April 30, 1974, the Court of Appeals for the Ninth Circuit, in a separate federal case, agreed that the Puyallup Reservation continued in existence and that the Tribe had an exclusive right to take fish from waters within that Reservation. *United States* v. *State of Washington*, *supra*. Neither decision was thereafter disturbed in any way significant to the questions under consideration in the state courts.

The order of the state superior court in this case was not entered until April 8, 1975. The state superior court accepted the continued existence of the Puyallup Reservation (Pet. App. C-39) but declined in all other respects to accede to the results of the federal litigation.[6] The court, therefore, established

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[6] The defenses of *res judicata* and collateral estoppel, while perhaps not raised below with the greatest clarity, appear to have been sufficiently pleaded to impede further litigation on the matters in question. For example, Affirmative Defense I (App. 15) notes that the Ninth Circuit in *United States* v. *State of Washington*, 496 F.2d 620, certiorari denied, 419 U.S. 1032, had held that the Puyallup Reservation continued in existence and that the Tribe retained a "sole and exclusive right" to take steelhead on the Reservation. Affirmative Defense II (App. 15) cites to the district court opinion in *United States* v. *State of Washington*, 384 F. Supp. 312, affirmed, 520 F.2d 676 (C.A. 9), certiorari denied, 423 U.S. 1086, and states: "This decision affirms the right of the Puyallup Indian Tribe,

different allocation percentages and procedures and held that "the State can enforce reasonable restrictions on the commercial fishing of Indians even though the fish pass through a portion of the river that would be designated within the boundaries of an Indian Reservation" (Pet. App. C-51).

The state courts were not free to disregard the prior decisions of the federal courts on these matters. "Under the [Full Faith and Credit Clause] and 28 USC § 1738, which implements the Constitution and is broader in scope in some respects a valid judgment of one state must be given full faith and credit in the courts of another state and in the federal courts, and a valid federal judgment must be given full faith and credit in the state courts. Thus the doctrine of full faith and credit supports and

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under the Treaty of Medicine Creek, to share in the taking of 50% of the harvestable steelhead from the affected waters, exclusive of Puyallup tribal needs and on-reservation fishing." Although the answer speaks in terms of mootness (App. 15) and preemption (App. 16), the basis for claims of *res judicata* and collateral estoppel is set out in sufficient detail to provide the plaintiffs and the state court with notice of prior binding decisions. In fact, the trial judge explicitly rejected "the position that [he] was bound by Judge Boldt's decision" (Pet. App. C-30 to C-31).

Similarly, we believe that this issue is fairly raised by the Petition for Certiorari. The "Question Presented" (Pet. 2), though phrased in general terms, does challenge the right of the state courts to adjudicate on-reservation fishing rights, and the issue of collateral estoppel is specifically addressed in the petition (Pet. 31). This case does not, therefore, evidence "the practice of smuggling additional questions into a case after [the Court] grant[s] certiorari" (*Irvine* v. *California*, 347 U.S. 128, 129 (opinion of Jackson, J.)).

gives effect to the doctrine of res judicata, and accordingly 'the local doctrines of res judicata, speaking generally, become a part of national jurisprudence' [*Riley* v. *New York Trust Co.*, 315 U.S. 343, 349]." 1B Moore, Federal Practice, ¶ 0.406[1], pp. 901-903 (2d ed. 1974). See also *Stoll* v. *Gottlieb*, 305 U.S. 165; *Hancock National Bank* v. *Farnum*, 176 U.S. 640. Under principles of *res judicata*, "when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell* v. *County of Sac*, 94 U.S. 351, 352." *Commissioner* v. *Sunnen*, 333 U.S. 591, 597. When a second suit, not yet brought to judgment, is for a different cause of action, principles of collateral estoppel dictate that "a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies * * *." *Southern Pacific Railroad Co.* v. *United States*, 168 U.S. 1, 48-49.

The Department of Game has had a full opportunity to litigate in the federal lawsuits the extent of its regulatory power over both on-reservation and off-reservation fishing by the Puyallup Indians. In the lawsuit before Judge Boldt, the parties uniformly agreed that the State lacked the power to

regulate on-reservation fishing.[7] The court then gave extensive consideration to the question of off-reservation and set forth principles of allocation that ensured full protection of the Indians' treaty rights. There is no indication that the materials before Judge Boldt were misleading or in any way deficient. The Department of Game is precluded, therefore, from relitigating those issues in a different forum.

For several reasons, we do not believe that the remand from this Court in *Puyallup II* was intended to, or did, supplant traditional principles of finality in litigation. To begin with, the question of regulating on-reservation fishing was never addressed in the prior *Puyallup* cases; as we have discussed (pp. 14-15, *supra*), those cases involved off-reservation fishing rights alone. Moreover, although the Washington Supreme Court stated that this Court "specifically remanded this case for a determination of a fair allocation that 'accommodate[s] the rights of Indians under the Treaty and the rights of other people.' See *Puyallup II* at 49," (Pet. App. B-6) the Court in *Puyallup II* did no more than to hold that the previous regulations of the Department of Game failed to protect the Indians' treaty rights. The Court did not direct the state courts or the Department of Game to devise allocation formulas but merely noted that the "aim" of any formula, or any other pro-

[7] Judge Boldt specifically noted: "All parties in this case agree that on reservation fishing is not subject to state regulation and no issue to the contrary is presented in this case" (384 F. Supp. at 341).

posed solution, must be the fair accommodation of competing interests in off-reservation fishing—a result since achieved in the federal litigation before Judge Boldt. Finally, at the time that this Court decided *Puyallup I*, the federal decisions later raised as a bar to further litigation of the same issues in *Puyallup III* had not yet been handed down. Under those circumstances, this Court hardly can have intended to invert the normal principles of *res judicata* and collateral estoppel and deny force to those federal decisions because of the expected pendency of further proceedings in state court.

Nor does the presence of the plaintiffs-intervenors [8] in this lawsuit make relitigation of these issues appropriate. Although neither intervenor was a party to the federal lawsuit before Judge Boldt, the Northwest Steelheaders did participate fully in briefing and argument before the court of appeals. This appearance was sufficient to allow meaningful presentation of its views, and the policies of judicial finality and freedom from vexatious and repetitive litigation argue in favor of barring reconsideration of identical issues in this lawsuit.

Moreover, the interests of all plaintiffs-intervenors were fully represented by the State in the federal litigation before Judge Boldt and intervenors would have benefitted from any judgment favorable to the State in that litigation. Although intervenors sug-

[8] Northwest Steelheaders Council of Trout Unlimited and Gary Ellis; and Western Steelheaders, Inc. (Pet. App. B-1).

gest that they are seeking a declaration of *personal* rights in the steelhead fishery, those rights, to the extent that they involve non-hatchery fish available for capture off the Reservation, can be no more than the right to fish *in common with* the Puyallup Indians—a right possessed by all citizens of the State subject to appropriate regulation. A judgment against the State affecting those fish, therefore, binds its citizens as well. See *City of Tacoma* v. *Taxpayers*, 357 U.S. 320, 340-341. To the extent that the rights claimed are in hatchery fish alone, because of license fees paid for their propagation, intervenors' interest is limited primarily to a matter not decided by the federal courts and not raised as a question presented in the petition here. Intervenors' interest is certainly not sufficient to justify the state courts' refusal to give full faith and credit to the lower federal courts' determination that the State may not regulate Tribal fishing on the reservation.

III. THE RIGHT OF THE PUYALLUP TRIBE TO FISH ON ITS RESERVATION WITHOUT STATE INTERFERENCE IS PRESERVED BY THE TREATY OF MEDICINE CREEK.

The Treaty of Medicine Creek, 10 Stat. 1132, between the United States and various Indian bands (including the Puyallup Tribe), provided that certain lands previously occupied by the Indians would be ceded to the United States for an agreed consideration. The same treaty also provided that specified tracts of land, including the present Puyallup Reservation, would be "reserved for the present use and

occupation of the said tribes and bands * * *." According to Article II of the Treaty, those tracts were to be "set apart, and, so far as necessary, surveyed and marked out for their *exclusive use*; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent" (emphasis added).

Article III of the Treaty, considered by this Court in *Puyallup I* and *Puyallup II*, supplemented the reservation fishing rights by providing: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory * * *." Article III conveyed no fishing rights on the Reservations to white settlers within the Territory; rather it reserved to the Indians their prior fishing rights in the ceded territory, now outside the Reservations, subject only to the qualification that they were no longer to be exclusive but to be exercised "in common with" other citizens. These rights were in addition to the rights reserved under Article II, not in derogation of them.

The principles to be applied in interpreting the provisions of this Treaty have been set forth in numerous prior decisions of this Court. "[T]he wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice." *Antoine* v. *Washington*, 420 U.S. 194, 199. "It is [the court's] responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council, and

in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people" (*Tulee* v. *Washington*, 315 U.S. 681, 684). " 'Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930)" (*McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 174).

In light of these principles we believe that Article II of the Treaty of Medicine Creek provided for the Puyallup Tribe a Reservation on which its members were entitled to fish free from state interference. In 1854 fishing was generally an integral part of tribal life upon the Reservations (see *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 405-406); and Indians largely depended upon fish for their subsistence. "The right to hunt and fish was part of the larger rights possessed by the Indians in the lands used and occupied by them. Such right, which was 'not much less necessary to the existence of the Indians than the atmosphere they breathed' remained in them unless granted away. *United States* v. *Winans*, 198 U.S. 371." Op. Acting Sol. M. 28107, June 30, 1936, quoted in Department of Interior, *Federal Indian Law* 497 (1958). At that time, more than three decades before admission of the State of Washington to the Union, the Indians could not have expected that by agreeing to remove to a Reservation set apart for "their exclusive use," they had conferred upon future white settlers in the surrounding area

the power to limit the Indians' traditional fishing rights upon the Reservation. Rather the parties to the Treaty must have intended that the Indians could continue their tribal existence, as before, on the lands to which they were removed—that is, the Indians would be free to fish on their Reservation, subject only to the terms of the Treaty itself.

Indeed, the Supreme Court of Washington, without discussing Article II of the Treaty, lends support in its opinion to our position that the parties to the Treaty did not intend to limit traditional Indian fishing rights. Reviewing the historical background of the Treaty in its analysis of Article III, that court observed (Pet. App. B-22):

> [A]t the time of the Treaty in 1854, the parties did not contemplate the event of conservation requirements necessary to preserve the species. There was an inexhaustible supply of fish, see Uncommon Controversy, [Fishing Rights of the Muckleshoot, Puyallup and Nisqually Indians (A Report Prepared for the American Friends Service Commission] at 4 n. 3, 61-62, and the Treaty was undoubtedly premised on this condition.

In short, there was at that time no need to impose by treaty the limitations upon on-reservation fishing that the Department of Game now seeks to impose by enforcement of its regulations through the state courts.

We recognize, of course, that conditions today have changed. Expanding population, particularly non-Indian population, and the increased sophistica-

tion of fishing methods create demands on the supply of steelhead trout unforeseen in 1854. But the press of changed circumstances, without more, is not a sufficient reason for the State unilaterally to disregard or redraw Indian treaty rights without seeking legislation by Congress that takes into account the Indians' continuing interest and provides an appropriate consideration for any rights now modified. The treaty rights of the Indians, by virtue of the Supremacy Clause, are not subject to limitation by state legislation in that manner. *United States* v. *Pink*, 315 U.S. 203; *Santovincenzo* v. *Egan*, 284 U.S. 30. See also *Missouri v. Holland*, 252 U.S. 416; *Maiorano* v. *Baltimore & Ohio R.R. Co.*, 213 U.S. 268.

Although the matter is not strictly relevant to interpretation of the Treaty of Medicine Creek, we note that the concern expressed by the state superior court below—that the Indians would deplete the entire steelhead run by on-reservation fishing (Pet. App. C-40)—appears overstated. The Puyallup Indians have not sought at any time to capture all fish passing through the Reservation and the record does not support speculation that they intend to do so. Nor does this case present the question whether the Treaty of Medicine Creek could be interpreted consistently with the Indians' benefit to protect against total exhaustion of the fish supply. Moreover, Congress presumably retains the power to prevent abuse of the Indians' fishing rights if the need for such protection should arise.

IV. THE STATE OF WASHINGTON DOES NOT HAVE THE POWER TO REGULATE THE ON-RESERVATION FISHING ACTIVITIES OF THE PUYALLUP TRIBE.

Should the Court conclude that the Treaty of Medicine Creek does not reserve to the Puyallup Tribe unrestricted fishing rights on its Reservation, the Court would have to decide whether the State has the power to exercise jurisdiction over the on-reservation fishing activities at issue in this case. We believe the State does not have such power.

The State of Washington, like other States, has no inherent general jurisdiction over Indian activities occurring within the boundaries of an Indian reservation. See *Bryan* v. *Itasca County, supra*, 426 U.S. at 376-377, n. 2.[9] To the contrary, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789. As this Court recently stated in *McClanahan* v. *Arizona State Tax Commission*, *supra*, 411 U.S. at 168:

> This policy was first articulated by this Court 141 years ago when Mr. Chief Justice Marshall held that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boun-

[9] Nor has Washington acquired jurisdiction under Public Law 280, 28 U.S.C. 1360, over criminal and civil matters affecting the Puyallup Indians. We do not address the question whether Public Law 280, if applicable, would permit regulation of on-reservation fishing activities by the Puyallup Tribe.

daries, which is not only acknowledged but guarantied by the United States." *Worcester* v. *Georgia*, 6 Pet. 515, 557 (1832). It followed from this concept of Indian reservations as separate, although dependent nations, that state law could have no role to play within the reservation boundaries.

The doctrine of tribal immunity from state jurisdiction, which has served as well as a "backdrop" for the doctrine of federal preemption, *McClanahan*, *supra*, 411 U.S. at 172; *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 376-377, n. 2, is not absolutely rigid. The Court has permitted a narrow exercise of state jurisdiction over matters involving Indians separate and apart from the reservation and over matters involving non-Indians. *McClanahan*, *supra*, 411 U.S. at 171; *Moe* v. *Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480-481. Modification of the doctrine has occurred, however, only "in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized" (*Williams* v. *Lee*, 358 U.S. 217, 219). The pivotal consideration in those cases has been defined as "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them" (*id.* at 220; *Fisher* v. *District Court*, 424 U.S. 382, 386) or whether the state action would "interfere with reservation self-government or would impair a right granted or reserved by federal law" (*Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148.

This case involves neither the conduct of non-Indians upon reservation lands nor the conduct of Indians off reservation lands.[10] The State of Washington instead seeks to extend its regulatory powers onto the Reservation, to control the activities of the Tribe and its members, because it believes those activities may have an adverse impact on non-Indians outside the Reservation. The state superior court has issued an opinion prohibiting certain fishing practices conducted solely within the reservation boundaries; that opinion presumably may be enforced by contempt proceedings. Thus, the potential interference with tribal sovereignty, and with plenary federal control over Indian affairs (*Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476), is both direct and considerable.

The fact that the Puyallup Tribe might be taking fish on its Reservation in excess of the rights preserved by the Treaty of Medicine Creek would not in itself justify interference by the State. In our view, the doctrines of sovereign immunity and federal preemption do not serve only to protect the Indians from state regulation of lawful activity. Rather, they rest upon the premise that unauthorized entry onto reservation lands by State officials, whether to enforce state or federal laws, is inconsistent with both the independent status of Indian tribes and the primary responsibility of the federal government over Indian affairs.

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[10] In *Puyallup I* and *Puyallup II*, the State sought to regulate the conduct of Indians fishing off the Reservation.

Although we are not prepared at this time to say that a State may never seek to regulate Indian practices upon a Reservation, regardless of the effect on citizens outside the Reservation, the circumstances of this case do not call for even a narrow exception to the tradition of noninterference. As yet, the citizens of the State of Washington have suffered no serious deprivations from the exercise of fishing rights by the Puyallup Tribe; thus, the State is not acting under narrowly circumscribed powers to moderate a situation of emergency. The record does not show that the State will be unable to provide an adequate supply of fish for its sport and commercial fishermen unless it reaches its regulatory arm onto the Puyallup Reservation. Moreover, the State has had a full opportunity to argue its position in federal court in a lawsuit to which the United States, as well as the Puyallup Tribe, is a party. Should the Puyallup Tribe fail to comply with the terms of the judgment in that case, federal enforcement may be available. And Congress, of course, remains free to enact federal legislation to remedy any difficulties that actually arise.

Even if the State's efforts at on-reservation regulation are viewed in terms of the existing narrow exceptions to the policy of noninterference (p. 28, *supra*), the regulation is not justified. The right to fish upon a Reservation is a right long associated with tribal existence. Although it may no longer be true that exercise of the right is "not much less necessary to the existence of the Indians than the atmos-

phere they breathed," *United States* v. *Winans*, 198 U.S. 371, 381, the record indicates that fishing plays an important role in the economic preservation of the Puyallup Tribe. In fact, fishing rights are about all the Tribe has retained, as the bulk of its lands were sold. To cut back these rights, as the State would do, would cause a significant hardship to the Tribe and its members.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Washington should be reversed.

Respectfully submitted.

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of the United States

OCTOBER TERM, 1976

No. 76-423

PUYALLUP TRIBE, INC., and
RAMONA BENNETT,

Petitioners,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, and NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED and GARY ELLIS,

Respondents.

RESPONSE OF NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED AND GARY ELLIS TO AMICUS CURIAE BRIEF OF THE UNITED STATES

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ARGUMENT

The United States as *amicus curiae* argues on page 21 and 22 of its brief that *res judicata* and collateral estoppel bar Northwest Steelheaders Council of Trout Unlimited and Gary Ellis from litigating issues in this case because of the decision of Judge Boldt in *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash., 1974), aff'd 520 F.2d 676 (9th Cir., 1975, cert. den. 423 U.S. 1086 (1976). This conten-

tion must fail for any one of the following reasons:

1. The answer of Puyallup Tribe, Inc. and Ramona Bennett does not raise the issue of *res judicata* or collateral estoppel for the decision of Judge Boldt (App. 11-18). Under Washington law *res judicata* or collateral estoppel are affirmative defenses which must be raised by answer or be waived. *Davis* v. *Nielson*, 9 Wash. App. 864, 515 P.2d 995 (1973) (*res judicata* is an affirmative defense); *Davies* v. *Metropolitan Life Insurance Co.*, 191 Wash. 459, 71 P.2d 552, appeal dismissed, 306 U.S. 665 (1937) (defense of *res judicata* requires pleading and proof and cannot be raised by demurrer).

2. The assignments of error of Puyallup Tribe, Inc. and Ramona Bennett in their briefs to the Supreme Court of Washington do not raise *res judicata* or collateral estoppel for the decision of Judge Boldt. (Puyallup Br. 17-24; Bennett Br. 1-7, App. A-1-6). Under Washington law a matter not raised by assignment of error is waived. *Eichler* v. *Yakima Valley Transportation Company*, 83 Wash. 2d 1, 514 P.2d 1387 (1973) (arguments not assigned as error are not considered on appeal); *Rutter* v. *Rutter*, 59 Wash. 2d 781, 370 P.2d 862 (1962) (the Court will not consider an issue not raised in trial court or assigned as error).

3. Petitioners cannot raise in this Court a matter not presented to the courts below. *Safeway Stores, Inc.* v. *Oklahoma Retail Grocers Ass'n., Inc.*, 360 U.S. 334, 342 (1959) (appellant's claim which was not raised below will not be considered); *Walters* v. *City of St. Louis*, 347 U.S. 231 (1954) (this Court will not review what State Supreme Court below did not decide).

4. Even if *res judicata* or collateral estoppel are fairly comprised in the issue set forth in the Petition for Certiorari they are barely mentioned in the Petition for Certiorari and are waived. *Cf.*, *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 334-35 (footnote 10) (1963) (issues not developed with any fullness before this Court are considered abandoned).

5. An *amicus curiae* has no standing to raise a new issue in this Court that was not appropriately raised by a party. *Knetsch* v. *United States*, 364 U.S. 361, 370 (1960) (this Court refused to pass on an issue raised by the *amicus* but not by a party).

In addition to these five separate reasons which benefit all respondents, Northwest Steelheaders Council of Trout Unlimited and Gary Ellis can rely on these additional reasons:

6. The brief of petitioners in this Court does not seek to raise *res judicata* and collateral estoppel against Northwest Steelheaders Council of Trout Unlimited and Gary Ellis and the issues are waived. *Cf.*, *United States* v. *Philadelphia National Bank*, *supra*.

7. Northwest Steelheaders Council of Trout Unlimited and Gary Ellis were not parties in the case before Judge Boldt, *United States* v. *Washington*, supra, were denied intervenor status, and cannot be barred by

a case in which we were not parties.* *United Automobile, Aerospace & Agricultural Implement Workers, Local 283* v. *Scofield*, 382 U.S. 205, 213 (1965) (party denied intervenor status is not bound by *res judicata* rules; there the Court refused to consider the union bound by litigation conducted by the United States on its behalf); *Blonder-Tongue Laboratories* v. *University of Illinois Foundations*, 402 U.S. 313, 329 (1971) (litigants who did not appear in prior action may not be collaterally estopped); *Samvick* v. *Puget Sound Title Insurance Co.*, 70 Wash. 2d 438, 423 P.2d 624 (1967) (escrow agent who was not a party is not bound by prior litigation).

Respectfully submitted,

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---

* Judge Boldt granted all motions for intervention of Indian Tribes and denied all motions for intervention of commercial or sports fishing groups. One commercial group (the Reefnetters) was allowed to intervene by another judge during the period that Judge Boldt was on the Federal Pay Board and not involved with the case. Northwest Steelheaders were specifically denied intervenor status by Judge Boldt after the United States opposed the granting of such intervenor status. We were granted intervenor status on a similar showing by the period that Judge Boldt was on the Federal Pay Board and the trial court in this case and by the Ninth Circuit in *United States* v. *Washington*.

[redacted]

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

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v.

DEPARTMENT OF GAME OF STATE OF WASHINGTON and NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED and GARY ELLIS,
Respondents.

[redacted] THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION [redacted] BRIEF AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Tribal Chairmen's Association (NTCA), pursuant to Rule 42 of the Rules of this Court, moves for leave to file the accompanying brief as amicus curiae in support of the petitioners. The petitioners and the respondents, Northwest Steelheaders Council of Trout Unlimited and Gary Ellis, have consented in writing to this brief. The respondent Department of Game of State of Washington has refused to consent.

The petitioners have questioned whether a state court, or any state agency, may regulate treaty fishing rights exercised by members of the Puyallup Tribe while on their reservation. NTCA files this motion because of the enormous impact this Court's response will have on all federally recognized, reservation-based Indian tribes. We respectfully refer the Court to the statement of the interest of NTCA in the accompanying brief.

Respectfully submitted,

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BRIEF AMICUS CURIAE

INTEREST OF THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION AS AMICUS CURIAE

The National Tribal Chairmen's Association (NTCA) is a voluntary, non-profit organization composed of the chairmen, presidents, governors, or chiefs of reservation Indians or federally recognized Indian tribes with federal trust lands or whose members live on or near federal reservations having a local governing entity. The heads of all Alaska Native Regional Corporations also are eligible for membership. NTCA members all are leaders duly elected or appointed by

their people according to their tribal constitutions or governing instruments. Approximately 190 federally recognized tribes having a population of around 90 percent of the approximately 800,000 American Indians are represented in NTCA. The purpose of NTCA, as an official voice of American Indian leaders, is to encourage the preservation of Indian cultures and to promote economic, political, and social progress among Indian people. NTCA declares it its purpose, among other things, to ensure that the historic trust relationship between the United States and the reservation Indians, including federally recognized tribes, is not impaired or terminated and to employ treaty rights and privileges for the promotion and protection of the human and natural resources of Indian reservations or groups and federally recognized tribes.

Thus NTCA has a clear and vital interest in the *Puyallup* litigation. In *Puyallup III*, the Supreme Court of Washington has held that it and other state instrumentalities have the power to regulate the exercise of treaty fishing rights by members of the Puyallup Tribe while on their reservation. *Department of Game v. Puyallup Tribe, Inc.*, 86 Wash. 2d 664, 548 P.2d 1058, 1063-64 (1976). As a spokesman and representative for the reservation-based and federally recognized Indian tribes of this country, NTCA must challenge vigorously such an affront to Indian tribal sovereignty, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559-61 (1832), and to the unique trust relationship between the federal government and the Indian people, *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974), both of which this and other courts have consistently recognized and respected, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122-23 (U.N.Mex. 1971). Every

one of NTCA's members, all leaders of federally recognized tribes, will be directly affected by this Court's decision in *Puyallup III*.

Petitioners, appropriately, have emphasized and will emphasize the peculiar facts associated with this litigation. NTCA, however, as a collective voice of Indian leadership in this country, stands in a unique position to present the Court with the broad ramifications inherent in the decision to be reached. All Indian tribes, all Indian people will be touched. Their voices should be heard. NTCA is the vehicle for this necessary communication.

ARGUMENT

That state laws have no effect upon Indians within an Indian reservation was settled by this Court 145 years ago in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). There, Chief Justice Marshall wrote:

> The Cherokee nation . . . is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.

Id. at 561. Although this basic principle consistently has been followed by this Court, *Williams v. Lee*, 358 U.S. 217, 223 (1959), Mr. Felix Cohen, in his treatise on federal Indian law, warned that "many . . . state courts and state legislatures since [*Worcester*] have . . . refused to acknowledge the implications of the decision." F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 116 (U.N.Mex. 1971). This, simply, is the crux of *Puy-*

allup III. The Supreme Court of the State of Washington has held that it and other state instrumentalities have the power to regulate treaty fishing rights exercised by members of the Puyallup Tribe while on their reservation. *Department of Game v. Puyallup Tribe, Inc.* 86 Wash. 2d 664, 548 P.2d 1058, 1063-64 (1976). The state has no such power. *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 170-71 (1973); *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 412 n.12 (1968).

The Puyallup Tribe is recognized by the federal government; it has adopted a tribal constitution, approved by the Secretary of the Interior, and is organized under section 16 of the Indian Reorganization Act, 25 U.S.C. § 476 (1970). The tribe is a functioning and viable entity, with an active Chairperson and Tribal Council. For example, the Puyallups employ a fishery biologist.

The Puyallup Indian Reservation, established by Article II of the Treaty of Medicine Creek, 10 Stat. 1132, 1132-33 (1854), continues to exist. *United States v. Washington,* 496 F.2d 620, 621 (9th Cir.), *cert. denied,* 419 U.S. 1032 (1974). Undisputed trial testimony establishes that the tribal fishery at issue occurs virtually entirely within the reservation. Petition for Certiorari, at 7-8.

The treaty provisions establishing the Puyallup reservation clearly preclude state interference with on-reservation tribal fishing. Article II provides that the reservation "shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent." 10 Stat. at 1132-33. This provision

must be interpreted liberally and as the Indians would have understood it. *Antoine v. Washington,* 420 U.S. 194, 200 (1975); *United States v. Winans,* 198 U.S. 371, 380-81 (1905). The Puyallups undoubtedly understood the right to put the reserved territory to their "exclusive use" to include unfettered control over their previously undisturbed fishing rights. *See Menominee Tribe of Indians v. United States,* 391 U.S. 404, 405-06 (1968); *Williams v. Lee,* 358 U.S. 217, 221-22 (1959); *United States v. Winans,* 198 U.S. 371, 381 (1905); *United States v. Washington,* 520 F.2d 676, 690 (9th Cir. 1975) *cert. denied,* 423 U.S. 1086 (1976); *Kimball v. Callahan,* 493 F.2d 564, 566 (9th Cir.), *cert. denied,* 419 U.S. 1019 (1974); *United States v. White,* 508 F.2d 453, 457 (8th Cir. 1974). Congress never has abrogated this treaty right to "exclusive use" of the on-reservation fishery. *See Menominee Tribe of Indians v. United States,* 391 U.S. 404, 412-13 (1968). This treaty right, therefore, remains the supreme law of the land and is binding upon the State of Washington. U.S. CONST. art. VI, cl.2; *Antoine v. Washington,* 420 U.S. 194, 201, 204, 205 (1975); *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 412 n.12 (1968); *United States v. Washington,* 520 F.2d 676, 684, 685 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 117 (U.N.Mex. 1971).

Even were there no treaty provision guaranteeing the exclusive right of the tribe to fish within the reservation, application of the *Worcester* doctrine precludes state regulation of this activity. Resolution of jurisdictional disputes between a tribe and a state, absent a governing Act of Congress, turns upon whether the state action infringes upon treaty-protected reservation self-government. *Fisher v. District Court,* 424 U.S. 382 386 (1976); *Williams v. Lee,* 358 U.S. 217, 220 (1959).

Accordingly, states have been considered to be without power to enforce their fish and game laws on reservation activity. *Moore v. United States,* 157 F.2d 760, 763-64 (9th Cir. 1946), *cert. denied,* 330 U.S. 827 (1947). *See Organized Village of Kake v. Egan,* 369 U.S. 60, 75 (1962); *Tulee v. Washington,* 315 U.S. 681, 683 (1942). There can be no other conclusion under the *Williams* test. This Court long ago recognized the importance of fishing rights to the Washington tribes: They "were not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans,* 198 U.S. 371, 381 (1905). This truth still holds. The Puyallup economic base wholly is dependent upon a healthy tribal fishing industry. If the state has power to control the extent to which the tribe can fish, it has the power to control the extent to which tribal members can support themselves. Economic self-sufficiency is at the core of the tribe's power to manage its own affairs. There can be no self-government if the state has the power to destroy the tribe economically.

The Washington Supreme Court made no attempt to reconcile its assertion of power over the Puyallup reservation economy with the *Worcester-Williams* line of authority. Instead, the court interpreted this Court's remand in *Puyallup II, Department of Game of Washington v. Puyallup Tribe,* 414 U.S. 44, 49 (1973), as "expressly conferring jurisdiction in this matter in the state courts." *Department of Game v. Puyallup Tribe, Inc.,* 86 Wash.2d 664, 548 P.2d 1058, 1063 (1976). This misinterpretation of the *Puyallup II* remand cannot withstand analysis. In *Puyallup II,* this Court assumed it was dealing with state regulation of off-reservation treaty fishing rights. 414 U.S. at 45. This is not the case, for five months after this Court's *Puyallup II* decision, the Ninth Circuit affirmed that the Puyallup reservation still exists. *United States v. Washington,* 496 F.2d 620 (9th Cir.), *cert. denied,* 419 U.S. 1032 (1974). More importantly, however, the *Puyallup II* remand could not have been intended to confer jurisdiction on the state courts to regulate on-reservation fishing rights because this Court has always held that the power to confer such jurisdiction resides only in Congress. *Williams v. Lee,* 358 U.S. 217, 223 (1959); *Lone Wolf v. Hitchcock,* 187 U.S. 553, 564-568 (1903). When Congress has wished a state to extend its power to Indian reservations, it expressly has granted the jurisdiction denied since *Worcester. Williams v. Lee,* 358 U.S. 217, 221 (1959). No federal statute authorizes the State of Washington's blatant interference with tribal self-government. *See Fisher v. District Court,* 424 U.S. 382, 388 (1976).

Once an Indian reservation has been established, it can be terminated only by an express Act of Congress. *Mattz v. Arnett,* 412 U.S. 481, 504-05 (1973); *United States v. Celestine,* 215 U.S. 278, 285 (1909). Thus the mere allotment of reservation land or the opening up of such land to white settlers does not abolish reservation status. *Mattz v. Arnett,* 412 U.S. 481, 497, 504-05 (1973); *Seymour v. Superintendent of Washington State Penitentiary,* 368 U.S. 351, 356 (1962); *United States v. Celestine,* 215 U.S. 278, 287 (1909). The special nature of an Indian reservation obtains even when the cause of action arises within the limits of a town incorporated under state law. *Kennerly v. District Court,* 400 U.S. 423 (1971) (town of Browning, Montana). This Court thus has made clear that no circumstances short of an express Act of Congress terminate Indian reservation status.

The State of Washington's request that this Court authorize it to control the on-reservation economic activity of the Puyallup Tribe is not novel. It is a request that this Court has denied for nearly 150 years. *Williams v. Lee*, 358 U.S. 217, 223 (1959). It is a request that runs counter to the congressional policy designed to foster and perfect tribal self-determination and tribal economic development. *See* Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n (Supp. V 1975). The day states are allowed to regulate the manner in which Indian tribes support and govern themselves will be the day Indian tribes as distinct communities no longer exist. All Indian tribes, all Indian people will be injured if this Court allows the State of Washington to regulate the on-reservation tribal fishery of the Puyallup Tribe.

CONCLUSION

We respectfully pray that this Court reverse the judgment below and remand the case with directions that all state regulation of Puyallup tribal, on-reservation fishing be voided.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WASHINGTON

BRIEF OF AMICI CURIAE ON BEHALF OF PURSE SEINE VESSEL OWNERS ASSOCIATION, PUGET SOUND GILLNETTERS ASSOCIATION, WEST COAST TROLLERS ASSOCIATION AND THE NORTHWEST TROLLERS ASSOCIATION

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I.

INTEREST OF AMICI CURIAE

Amici Curiae represent associations (fishermen associations) of commercial fishermen and fishing vessel owners. Their members fish in Puget Sound, the Strait of Juan de Fuca, and the ocean off the coast of the State of Washington, and they catch the bulk of the commercial salmon taken by non-Indians. Their investment in fishing vessels is estimated at more than $150 million. Purse Seine Vessel Owners Association as well as other commercial and sports fishing associations have tried to intervene in United States v. Washington 384 F. Supp. 312 (W.D. Wash. 1974), (United States v. Washington), but were denied.[1] The fishermen are dismayed by the confusion and conflict caused by the judgment in United States v.

[1]The motions of Purse Seine Vessel Owners Association and Northwest Steelheaders Concil of Trout Unlimited to intervene were denied by the federal District Court on March 22, 1974. The motion of the Washington State Commercial Passenger Fishing Vessel Association to intervene was denied by the federal District Court on July 18, 1974.

Washington--the grant of prerogative rights to fish, for a few favored citizens,[2] and the continuing injunctions and persistent interference by the United States District Court for the Western District of Washington (federal District Court) to usurp the essential power of the State of Washington to regulate its fisheries.[3]

[2]Compare this Court's historic decision in Martin v. Waddell's Lessee, 16 Pet. 367, 10 L. Ed. 997 (1842), that the state's title to the beds of its navigable waters, like that of the English sovereign's, is held as a public trust, subject to a public common of piscary. The federal District Court made no mention of Martin. It is significant that the Indians did not enjoy any such common liberty to fish, before the white men came. See Haeberlin and Gunther, The Indians of Puget Sound 12, IV U. of Wash. Publications in Anthropology, 1930 (Library of Congress Catalog Card No. 30-27636) "Fishing, hunting and berry picking grounds were tribal property. . . . If . . . a tribe used the territory of another tribe without asking permission, the act was regarded as an invasion and war might follow."

[3]Compare, Lawton v. Steele, 152 U.S. 133, 38 L. Ed. 385 (1894) (certain waters closed to fishing), and Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 80 L. Ed. 772, ___ S. Ct. ___ (1936): "The plain purpose of the measure is to conserve for food the fish found within the waters of the state. Over these fish, and over state wild game

We now have conflicting interpretations of the Indian Treaties by the Washington State Supreme Court and the federal District Court. Consequently, this Court's decision in this case will resolve the confusion and conflict that has persisted since the decision in United States v. Washington. Amici support the arguments contained in respondents' briefs and urge this Court to review each of the issues raised by respondents therein, rather than confine itself to the single issue presented by petitioners.

II.

ARGUMENT

A. This Court Can Review Questions Not Raised In The Petition For Certiorari

The petitioners seek review of the single issue of state power to regulate on-reservation fishing. But this Court is not necessarily limited to a

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generally, the state has supreme control. . . . ". . . The provisions of the act assailed are well within the police power of the state, . . ." (426, 80 L. Ed. 775).

review of that issue; it can review the entire decision of the Washington State Supreme Court, if important questions are raised. As the Court said in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 320 n. 6 (1971):

> While this rule [23(1)(c)] reflects many decisions stating that the court is not required to decide questions not raised in a petition for certiorari, it does not limit our power to decide important questions not raised by the parties.

The Court has heretofore decided questions which were not raised in the petition for certiorari. Propper v. Clark, 337 U.S. 472 (1948) and West v. Rutledge Timber Co., 244 U.S. 90 (1916). In Oregon ex rel State Land Board v. Corvallis Sand & Gravel Co., ___ U.S. ___, 97 S. Ct. 582 (1977), this court reviewed and overruled its decision in Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973). The Oregon Supreme Court had followed Bonelli in the case below. The parties on appeal did not present, brief or argue the question of the Court's reconsideration of Bonelli. However, amici curiae (twenty-six states) joined in three briefs urging

that the Court reconsider Bonelli. The Court indicated that it was reconsidering Bonelli because the Oregon Supreme Court cited it (97 S. Ct., at 590, n.6) and amici elaborately argued it in their briefs (97 S. Ct. at 586, n.3).

B. The Decision Of The Washington State Supreme Court Presents Important Questions For Review

There are several important questions raised by the decision below which respondents have asked this Court to resolve. One is the allocation of steelhead between Indian and non-Indian fishermen. Amici Indian Tribes argue (Br. pp. 20-25) that this issue was decided by the federal District Court in United States v. Washington and, therefore, res judicata bars its reexamination. The res judicata argument, if applicable, is misplaced. In Department of Game v. Puyallup Tribe, Inc., 414 U.S. 404 (1973) (Puyallup II), this Court remanded the case to the Washington State Supreme Court to determine proper allocation of steelhead between Indian and non-Indian fishermen. That remand occurred before United States v. Washington was even

decided by the federal District Court. If res judicata applied, the federal District Court was bound to follow this Court's and the State Supreme Court's determination on that issue.

This Court in Puyallup II, and the Washington State Supreme Court on remand, addressed the issue of allocation in the context of off-reservation fishing. After this Court's decision in Puyallup II, and before the Washington State Supreme Court's decision below, the court of appeals held that the Puyallup Reservation still existed. United States v. Washington, 496 F.2d 620 (9th Cir. 1974). Amici believe the decision of the court of appeals must be reconciled with the decision of this Court in Puyallup II to determine how the allocation issue applies to on-reservation fishing and how it applies to off-reservation fishing. The federal and state courts are in conflict.

Another important question raised by the decision below which respondents and amici urge this Court to review is whether treaty rights extend to hatchery fish. The state and federal courts are

in direct conflict on this issue.[4] Indeed, in their brief (Br. p. 24) amici Indian Tribes themselves state:

> The initial ruling by the district court that hatchery fish were to be included within the treaty entitlement coupled with its intention to defer implementation of that portion of its ruling as it applied to the Puyallup Tribe and River, has produced a confusing situation, especially in light of the opposite holding by the state courts.

(Emphasis added). This confusion will continue until such time as this Court addresses the issue of whether treaty rights extend to hatchery fish.

Amici Indian Tribes further argue (Br. p. 4) that if this Court considers the hatchery issue as it relates solely to the Puyalup River, such a ruling could have a significant and adverse affect upon the continuing litigation in United States v. Washington. However, this argument overlooks two

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[4]The Washington State Supreme Court, in compliance with this Court's remand, in the case at bench held that treaty rights do not extend to hatchery steelhead (in fact, to all hatchery fish, p. 685). After the State Supreme Court's decision and on August 13, 1976, the federal District Court enjoined the State of Washington from excluding hatchery steelhead from the Indians' treaty share.

basic facts. First, the highest court in the State of Washington has ruled that treaty rights do not extend to hatchery fish. That ruling may only be reversed or modified by this Court. Second, if this Court fails to rule on the hatchery issue, it is certain that the parties to United States v. Washington will appeal any determination of that issue by the federal District Court. In the meantime, several fishing seasons will intervene and the existing confusion and conflict will not lessen.

State hatchery programs are likely to be delayed. Many Washington state legislators are understandably hesitant to appropriate public funds for hatchery programs until the hatchery issue is finally resolved. We, of course, believe that treaty rights should not extend to hatchery fish. Under the current rulings of the federal District Court, 50% of any appropriation of public funds for hatchery programs would be tantamount to a special subsidy for Indians. The treaties were never intended to impose upon the states the burden of subsidizing Indians.

Present consideration of the hatchery issue by this Court would result in substantial savings of time and resources, not only of the parties but of the trial and appellate courts as well.

C. Exceptional Circumstances Necessitate This Court's Review Of The Entire Decision Of The Washington State Supreme Court

Multiple litigation resulting in fragmented management of the salmon and steelhead fisheries has produced general disorder in the fisheries. Review by this Court of the entire decision of the Washington State Supreme Court can restore order to the Pacific Northwest fisheries. Implicit in the court's decision below is the question of who has the authority to manage the steelhead fishery. As the instant case shows, management of the Pacific Northwest fisheries of salmon and steelhead is presently shared by three entities: the federal District Court exercising continuing jurisdiction; the Indian Tribes, including the Puyallup Tribe; and the State of Washington acting through its Departments of Fisheries and Game. The orders and regulations issued by said managing entities

produce constant conflict in the steelhead and salmon fisheries. The federal District Court has ordered the state regulatory agencies to enact regulations which provide Indian fishermen with a larger share of the fisheries.[5] It has also enjoined the state from enforcing regulations which, in its opinion, deprive Indian fishermen of their share of the fisheries, and one injunction even prohibited the enforcement of regulations of an international commission established by a federal treaty between the United States and Canada.[6]

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[5] E.g., on July 16, 1975, the federal District Court issued an injunction requiring the Washington State Department of Fisheries to "promulgate appropriate regulations effective immediately to insure that Indian treaty fishermen may fish with any gear authorized by the State of Washington . . . ."

[6] E.g., although the state was obligated by state law (RCW 75.40.060), by federal statute (16 U.S.C. 776c), and by federal treaty (50 Stat. 1355) to prohibit fishing at certain times in certain waters regulated by the International Pacific Salmon Fisheries Commission, the federal District Court, nevertheless, on August 8, 1975, enjoined the State of Washington from prohibiting fishing by Indians in such waters during such times.

As a result of these orders, fishermen associations have commenced suits in the state courts contending that the Director of the Department of Fisheries has no authority under state law to comply with orders of the federal District Court.[7]

In an attempt to define the authority of the Department of Fisheries and its Director, the state courts have issued orders which conflict with the orders of the federal District Court.[8] The conflicting orders result in inefficient management of the salmon and steelhead fisheries of the Pacific Northwest. If the issues which were before the Washington Supreme Court below are not addressed by

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[7] E.g., Purse Seine Vessel Owners Ass'n, et al. v. Donald W. Moos, et al., Washington State Supreme Court No. 43938, and Puget Sound Gillnetters Ass'n, et al. v. Donald W. Moos, et al., Washington State Supreme Court No. 44401.

[8] E.g., on August 1, 1975, the Superior Court of the State of Washington for Thurston County, Cause No. 52881, entered an injunction which ordered the Director of the Department of Fisheries to suspend his regulation enacted in compliance with the federal District Court's order of July 16, 1975. See Note 5 above.

this Court, attempts to manage the salmon and steelhead fisheries will deteriorate.

Shared management of the salmon and steelhead fisheries has also impeded the orderly collection of data essential to the management and preservation of the entire run or resource.[9]

The Washington State Supreme Court itself looks to this Court for guidance and has said that this Court is the only court which can decide with finality the issues on which the state and federal courts are in conflict. Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 87 Wn.2d 417, 421, 553 P.2d 113 (1976). Further,

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[9] The testimony in the trial court on the size of the Indian catch on the Puyallup River during the 1973-74 season is illustrative of this point. The fish coordinator for the Puyallup Tribe testified that the Indians caught 2,000 to 2,500 steelhead. The biologist testifying on behalf of the tribe indicated that the Indians reported a catch of 1,800 steelhead. The Chairwoman of the tribe stated that the tribal catch was approximately 700. The biologist testifying on behalf of the Department of Game stated that the catch was approximately 3,000 steelhead. (Response to Pet. for Writ of Cert., p. 17).

in its decision below, the Washington State Supreme Court stated:

> The first phase of our opinion is held in abeyance pending a final disposition of the treaty interpretation issue by the United States Supreme Court. . . .

Department of Game v. Puyallup Tribe, Inc., 86 Wn.2d 664, at 688, 548 P.2d 1058 (1976).

The integrity of our federal system is threatened by the orders of the federal District Court in United States v. Washington. Two fishermen associations, Purse Seine Vessel Owners Association and Puget Sound Gillnetters Association, brought an action in a state superior court seeking a determination of the authority under state law of the Director of the state Deparment of Fisheries. The federal District Court entered an order on August 6, 1975, enjoining the state court from proceeding with the action.[10] Washington state

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[10] "3. The Superior Court of the State of Washington for Thurston County is hereby enjoined, pursuant to 28 U.S.C. 2283, from enforcing the injunction referred to in paragraph 2 above [n. 8 above]; and further proceedings in Cause No. 2881 (sic) are hereby stayed pending further order of this Court."

judges face contempt proceedings in the federal District Court if they continue to exercise their jurisdiction. This is an ignominious situation, one which, of itself, is a circumstance so exceptional that this Court should review the entire decision of the court below.

The conflicting decisions of the state and federal courts have produced another undesirable side effect. Washington State commercial fishermen have become politically attuned to the decisions of the state and federal courts in the various cases dealing with the Northwest salmon and steelhead fisheries. They are aware that the State Supreme Court and the federal District Court are at loggerheads over basic issues which vitally affect their interests. They are also aware of the fact that this Court is the only court which can authoritatively settle the issues and restore some semblance of order to the fisheries. These commercial fishermen have felt a deep sense of futility concerning the ability of the state and federal courts to resolve the complex fishery

issues. Consequently, there has been a series of demonstrations with one incident resulting in a near fatal shooting of a fisherman. The State of Washington Fisheries Patrol has been unable to handle the demonstrations and has enlisted the aid of the United States Coast Guard. Amici wish to bring this to the attention of this Court hoping to convince this Court that the existing circumstances surrounding the Pacific Northwest fisheries necessitate a complete review of the decision of the court below.

The survival of the salmon and steelhead runs, the orderly management of salmon and steelhead fisheries, the livelihood of Washington citizens, and the integrity of the federal court system compel a speedy resolution of the issues raised in the court below as set forth in respondents' briefs.

D. Review Of Lower Court's Decision Will Not Be Prejudicial To Any Party

If this Court does review the entire decision of the Washington State Supreme Court, there will be no prejudice to any party before it. The Puyallup Tribe has argued the issues which were before

the court below in Section V of its brief. In addition, 13 of 26 pages of the argument contained in the amici Indian Tribes' brief in support of petitioners are devoted to the questions decided in the court below which were not raised in the petition for certiorari. Furthermore, any decision of this Court, in addition to resolving the conflict presently before it, would provide authoritative guidelines for the resolution of on-going conflicts between the state and federal courts in this and other related Indian fishing cases.

III.

CONCLUSION

We, therefore, respectfully urge this Court to review all the issues raised by the Washington State Supreme Court in its decision below, as those issues are set forth in respondents' briefs.

Respectfully submitted,

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I

INTEREST OF AMICI CURIAE

Amici Treaty Indian Tribes listed below[1] are all tribes which are signatories to treaties with the United States government.[2] Each treaty contains language guaranteeing hunting and fishing rights similar to language found in the Treaty of Medicine Creek involved in this litigation.

1. Lower Elwha, Lummi, Makah, Muckleshoot, Nisqually, Nooksack, Port Gamble, Quileute, Quinault, Skokomish, Squaxin Island, and Suquamish.

2. Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132; Treaty of Point Elliott, January 22, 1855, 12 Stat. 927; Treaty of Point No Point, January 28, 1855, 12 Stat. 933; Treaty with the Makah, January 31, 1855, 12 Stat. 939; Treaty with the Quinaeilt, July 1, 1855, 12 Stat. 971.

Amici Northwest Indian Fisheries Commission (N.W.I.F.C.) is a voluntary association of Western Washington Indian Tribes conceived and organized by the tribes themselves in order to facilitate the implementation of *United States v. Washington,*[3] (Civil Cause No. 9213, W.D. Wash. 384 F.Supp. 312 (1974), 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). (Whenever *United States v. Washington* is referred to herein, it is this cited case and *not United States v. Washington*, 496 F.2d 620 (9th Cir. 1974), *cert. denied*, 419 U.S. 1032 (1974), involving the Puyallup Tribe.)

Amici Confederated Tribes of the Colville Indian Reservation are federally-recognized Indian tribes occupying a reservation which encompasses 1.3 million acres in the eastern portion of the State of Washington. The Reservation on which the Tribes reside was established by Executive Order on July 2, 1872 (1 KAPPLER 916) and is governed by a Constitution and By-Laws approved by the Secretary of the Interior on February 26, 1938.

Amici treaty tribes are each parties to *United States v. Washington, supra,* the continuing adjudication of treaty

3. N.W.I.F.C. is an unincorporated association formed in 1974 by treaty tribes which are parties to *United States v. Washington*. The Commission was formed to formulate a broad general fisheries program designed to promote and coordinate the conservation practices of the member tribes. It is composed of one representative from each of the five treaty areas. Each treaty area is represented by a treaty council which elects a single representative to serve as a commissioner on the Commission. Each treaty area is also served by a coordinator, a paid staff member who asists the tribe in developing and coordinating their fisheries programs. The coordinators maintain treaty area offices and serve as communication links between the tribes in the central Commission office. The central office is located in Olympia, Washington. This office houses an administrative and public relations staff and the office of biological programs.

fishing rights in Western Washington.[4] In *United States v. Washington,* amici treaty tribes and others were required to accept the responsibility of the management of their fisheries. *See* 384 F.Supp. at 340, and Program to Implement Interim Plan, Appendix "A" herein. This responsibility has required tribal governments to manage fisheries which occur both on and off-reservation. Amici Colville Tribes have the exclusive responsibility of regulating on-reservation fisheries.[5] *Confederated Tribes v. Washington,* 412 F.Supp. 615 (E.D. Wash. 1976). The only issue before this Court deals with the power of the State of Washington to interfere with tribal on-reservation fishery management. A ruling by this Court will affect amici's continuing ability to manage their own resources, and could well interfere with the continuing adjudication in *United States v. Washington.*

Further, on September 16, 1976, certain amici tribes filed an amended and supplemental complaint for declaratory judgment in *United States v. Washington* (Phase II). Phase II seeks to finally determine the treaty Indian entitlement to hatchery fish and seeks to prevent further State destruction of the fish resource. The supplemental complaint avers that the fish habitats have been destroyed or altered thus causing a dimunition of the fish resource. The State of Washington has had the power to prevent this substantial dimunition, but has not done so.

The District Court in Phase II will decide the treaty right to harvest hatchery fish,[6] after considering all of the tribal

4. N.W.I.F.C. and the Colville Tribes are not parties to *United States vs Washington*. N.W.I.F.C. assists the tribal parties to that case in facilitating Indian fisheries. The Colville Tribes exercise exclusive on-reservation regulation and management of fisheries. *Confederated Tribes v. Washington*, 412 F.Supp. 651 (E.D. Wash. 1976).

5. The Colvilles also exercise substantial off-reservation regulatory authority. *See Antoine v. Washington*, 424 U.S. 194 (1975).

6. The supplemental complaint avers that the State of Washington

situations in Western Washington, and examining each of the rivers.[7] It appears that the respondents in the instant case are urging this Court to consider this issue as it relates solely to the Puyallup River and to steelhead. Such a ruling, if made, could have a significant and adverse effect upon the continuing litigation in *United States v. Washington* and the tribes party thereto.

For these reasons, amici have a substantial interest in the outcome of this litigation. In addition to the comment on the specific issue presented by this appeal, this brief is a request to the Court to limit the appeal to the narrow issue presented by petitioners. Any broadening of the scope of the appeal will work a grave injustice not only on all amici but all other Indian tribes wherever situated who have not had the opportunity to present the complete factual and legal matrix within which federally-protected fishing rights exist. Without "competing examples" the record is woefully insufficient to allow a proper adjudication.[8]

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has introduced hatchery-reared fish to mitigate the adverse impacts of overfishing and environmental degradation and to some degree fish of hatchery origin have replaced or become inextricably comingled with native fish. These issues were not adequately dealt with in the case below.

7. The Puyallup Tribe is a party to *United States v. Washington* and will participate in Phase I' The hatchery issue even as it pertains to the Puyallup can better be dealt with in Phase II.

8. In "An Introduction to Legal Reasoning", Edward H. Levi noted:

> What does a law forum require? It requires the presentation of competing examples. The forum protects the parties by making sure that the competing analogies are before the court. The rule which will be created arises out of a process in which, if different things are to be treated as similar, at least the differences have to be urged. In this sense, the parties as well as the court participate in the lawmaking.

Edward H. Levi "An Introduction to Legal Reasoning" University of Chicago Press, 1948, p. 5.

In the present case, the Puyallup situation is just one example (and an atypical one at that) of reservation fishing.

II

SUMMARY OF ARGUMENT

A. The State of Washington has no jurisdiction to regulate fishing by tribal members on an Indian reservation. Establishment of Indian reservations vests substantial fishing rights in Indian tribes. *Menominee v. United States*, 391 U.S. 404 (1968). These substantial rights are subject to tribal control and the State may not regulate or interfere with the Tribe's exercise of sovereign power over fishing and hunting affairs within its reservation. *See, Moore v. United States*, 157 F.2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947); *Hunt v. United States*, 278 U.S. 96 (1928); *Mason v. Sims*, 5 F.2d 225 (W.D. Wash. 1925). Such rights continue unless explicitly abrogated or terminated by act of Congress. *Menominee v. United States*, 391 U.S. 404 (1968). No act of Congress can be found that would grant to the State of Washington power to regulate Indian fishing within the boundaries of an Indian reservation. The only remotely relevant act of Congress, Public Law 83-280, expressly states the intent of Congress to disable the State from assuming such power. The State statute carrying into effect P.L. 83-280 within Washington contains an express disclaimer that nothing in the act shall deprive the Indian tribes of the control, licensing or regulation of fishing. (*See Antoine v. Washington*, 424 U.S. 194, n.10 (1975), RCW 37.12.060)

B. Respondents have sought to interject before this Court two additional issues not properly raised by this Court's grant of certiorari; 1) an interpretation of Indian treaties with the federal government; and 2) a determination that Indian fishermen do not have a treaty right to fish for so-called artificially-propagated salmon and steelhead.

Neither of these issues are now ripe for decision by this Court.

This Court is without facts relating to these issues upon which to make a properly reasoned judgment. While the decision of this Court will potentially affect at least 23 tribes and impliedly interpret five treaties, the scant record before this Court deals with only one tribe, the Puyallup, and one treaty.

Both issues are now or have been before the Federal District Court for the Western District of Washington in the case of *United States v. Washington*. Both petitioners and respondents herein are parties to that case. The record deficiencies found here are not present in that case. In *United States v. Washington*, the District Court had before it all treaties negotiated between tribes in Western Washington and the United States. The Court was called upon to interpret each one. The District Court found, as a matter of federal law, the proper allocation of fish between treaty and non-treaty fishermen and their relative rights under the treaties. That ruling is *res judicata* as to the State of Washington. *United States v. Washington, supra*. The District Court has set a trial date for a final resolution of the treaty entitlement to hatchery fish. All parties, including the Puyallup Tribe and the State of Washington, have expressed their intention to participate therein.

C. The decision of the court below misapplies and ignores fundamental tenets of Indian law, is based on incorrect factual assumptions and improper analogies, and adopts a rationale thoroughly discredited by previous rulings of this Court.

III

ARGUMENT

A. The State has no jurisdiction to regulate on-reservation fishing or allocate fish on-reservation between treaty and non-treaty fishermen

The sole question that this Court is being asked to resolve is whether the State of Washington may control the fishing activity of the members of the Puyallup Tribe within the boundaries of the Puyallup Indian Reservation.

This case has twice been before the Court for review and it has always been considered an off-reservation fishing case having no application to on-reservation fishing. *Puyallup Tribe v. Department of Game (Puyallup I)*, 391 U.S. 342, 396 n. 11 (1967). No change in scope was indicated by this Court in its second opinion. *Department of Game v. Puyallup Tribe (Puyallup II)*, 414 U.S. 44 (1973).

Despite the original limited nature of this case, the State Supreme Court suddenly transformed it and extended State regulatory authority to Indian on-reservation fishing. 86 Wn.2d 664, 668. Given that transformation, the rulings of Puyallup I and II should have no application.

1. *The genesis of on-reservation fishing rights*

Tribal fishing rights in Washington predate, of course, treaties such as the Treaty of Medicine Creek. Treaties made with Indian tribes during the years of western expansion are instruments which recognize and affirm such rights and not instruments which constitute a grant of rights *to* the Indians. *United States v. Winans*, 198 U.S. 371, 381 (1905).

Before treaties and agreements were made with Washington tribes, fishing was a major source of food and a

major commercial activity.[9] Thus the importance of reserved fishing rights to the tribes.

The instrument establishing the reservation need not specifically enumerate fishing rights for such rights to exist. Where no specific mention of the right to hunt and fish was made, ". . . such a reservation was not necessary to preserve the right on land reserved or retained in Indian ownership. The right to hunt and fish was part of the larger rights possessed by the Indians in the lands used and occupied by them. Such right remains in them unless granted away." Federal Indian Law, 496-498[10] citing Op. Act. Sol. M.28101, June 30, 1936.

2. *The nature and scope of on-reservation fishing rights*

It is well settled that Indian treaty rights must be viewed in light of the special trust relationship between Indian tribes and the United States and the special canons of construction formulated by this Court. *See Bryan v. Itasca County, Minnesota,* .... U.S. ...., 96 S.Ct. 2101 (1976), *Antoine v. Washington,* 424 U.S. 194 (1975). These rules are designed to ensure that the benefits intended for Indians by the treaties are actually realized.

Thus it has been held that the nature and scope of the Indian right to fish and wildlife on a reservation is absolute vis-a-vis the state. A state has no authority to interfere

9. *See United States v. Washington,* 384 F.Supp. 312 (W.D. Wash. 1974), p. 350 *et seq. See also* TEIT & BOAS; THE SALISHAN TRIBES OF THE WESTERN PLATEAUS, 45th B.A.E. Annual Report, 1927, (facsimile reproduction by Shorey Bookstore, 1973) at p. 237, 242.

10. *Federal Indian Law,* 1958, is a revision of the *Handbook of Federal Indian Law,* prepared by the office of the Solicitor under the editorial direction of Felix S. Cohen, Assistant Solicitor, and first printed in 1940. References in this brief are to the 1966 reprinting by the Association on American Indian Affairs, Inc. of the 1958 revision of the *Handbook.*

with hunting on federal lands. *Hunt v. United States,* 278 U.S. 96 (1928). Wildlife on a reservation belongs to the Indians as their property. *Mason v. Sams,* 5 F.2d 255 (W.D.Wash. 1925); *Pioneer Packing v. Winslow,* 159 Wash. 655, 294 P. 557 (1930).

Every court which has had occasion to consider the question has found that on-reservation fishing by Indians is beyond the reach of state regulation. *See, e.g., Kimball v. Callahan,* 493 F.2d 564 (9th Cir. 1974) *cert. denied,* 419 U.S. 1019 (1974); *Moore v. United States,* 157 F.2d 760, 765 (9th Cir. 1946), *cert. denied,* 330 U.S. 827 (1946); *Mason v. Sams,* 5 F.2d 255 (D.Wash. 1925); *Leech Lake Band v. Herbst,* 334 F.Supp. 1001 (D.Minn. 1971).[11] Indeed, the exclusivity of Indian regulation over *all* fishing (Indian and non-Indian) has been noted. *Colville v. Washington,* 412 F.Supp. 651 (E.D.Wash. 1976). Within a reservation, Indians are exempt from state conservation regulations. *Moore v. United States,* 157 F.2d 760 (9th Cir. 1946), *cert. denied,* 330 U.S. 827 (1947); *Kimball v. Callahan, supra.* The state may not interfere with tribal on-reservation wildlife laws. *Quechan v. Rowe,* 350 F.Supp. 106 (1972).

Clearly, establishment of reservations vested substantial and far-reaching fishing rights in the Indians, over which the State of Washington has no control or authority absent relinquishment of those rights by the Indians or abrogation of such rights by the Congress.[12]

11. This Court has always indicated that on-reservation fishing by members of an Indian tribe is not a matter for state control. *See Menominee v. United States,* 391 U.S. 404 (1968); *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918).

12. At the time that the rights vested, i.e., 1855, Washington was not yet a state. However, the subsequent fact of statehood does not change the authority or control of the state. A state must accept statehood subject to whatever outstanding rights and guarantees exist at the

The on-reservation fishing rights reserved by the tribes are clearly more extensive than the off-reservation rights reserved.

In *United States v. Washington*, the District Court succintly stated the difference, pointing out the exclusive right of Indians to act on-reservation:

> An *exclusive* right of fishing was reserved by the tribes within the area and boundary waters of their reservations . . . . The tribes also reserved the *right* to off reservation fishing 'at usual and accustomed grounds and stations' . . . . However, off-reservation fishing by other citizens and residents of the State is not a *right* but merely a *privilege* which may be granted, limited or withdrawn by the State as the interests of the State or the exercise of treaty fishing rights may require.

384 F.Supp. at 322.

3. *The states have never been granted a regulatory authority over tribal on-reservation fishing.*

One searches in vain for any grant of authority such as that claimed by the State in this proceeding which would allow it to regulate or control the taking of fish from waters within the reservation.

The State of Washington has never seriously attempted to regulate fishing within the bounds of a reservation. Indeed, in the case of *United States v. Washington*, 384 F.Supp. 312 (1974), the District Court observed that:

> All parties in this case agree that on-reservation fishing is not subject to State regulation and no issue to the contrary is presented in this case. Indeed any contention to the contrary would be diametrically opposed to the Indian self-government intent and philosophy of Congress.

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time of statehood. *See United States v. Winans*, 198 U.S. 371 at 382-84 (1905). *See also, Coyle v. Smith*, 321 U.S. 559, 570 (1911) and *Johnson v. Geralds*, 234 U.S. 442, 438-40 (1914); *Metlakatla v. Egan*, 369 U.S. 45, 59 (1962); *Antoine v. Washington*, 424 U.S. 194 (1975).

384 F.Supp. at 341. Both the Puyallup Tribe and the State of Washington are parties to *United States v. Washington*. It is difficult to see how the State, absent any new authority, and in the face of repeated denials of state power can legitimately contend before this Court that it has power over on-reservation fishing activities.

Congress has never chosen to exercise its plenary authority over Indian tribes by granting to states power to regulate on-reservation fishing. Such an exercise of Congress' authority would be, in effect, an abrogation of the reserved treaty right of Indians to fish on their reservations. If Congress were to exercise its authority it must exercise it expressly, and such an intent to abrogate must be clear on the face of the legislation or from the surrounding circumstances. *Menominee Tribe v. United States*, 391 U.S. 404 (1968), *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974), *cert. denied*, 419 U.S. 1019 (1974), *Seymour v. Superintendent*, 368 U.S. 351 (1962).

In the only remotely relevant act of Congress, Congress expressly acted to ensure that states would *not* acquire any jurisdiction over on-reservation activities. P. L. 83-280, 67 Stat. 588, 18 U.S.C. §1162 (1953). Public Law 280 was primarily designed as a vehicle to extend state criminal laws and procedures to Indian reservations. It came out of the termination period where tribal self-government was not vigorously supported by Congress. *Bryan v. Itasca County, Minnesota*, ... U.S. ....., 96 S.Ct. 2101 (1976) At a time when Congress was granting new powers to states, it is significant that Congress expressly denied to states the power to regulate treaty on-reservation fishing. Section 2(b) of P. L. 280, 18 U.S.C. 1162(b) reads as follows:

> Nothing in this section . . . shall deprive any Indian or any Indian tribe, band or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing or regulation thereof.

This Court has expressly noted that Public Law 280 does not deprive tribes of rights secured by any one of the federal promises mentioned (*i.e.*, treaty, agreement, statute or executive order.) *Antoine v. Washington*, 43 L.Ed.2d 129, 137 n. 10 (1975). *See also, Arnett v. 5 Gillnets*, 121 Cal. Rptr. 906 (1975), *cert. denied*, 47 L.Ed.2d 557 (1976). This Court's notation in *Antoine* is consistent with the whole history of litigation involving Indian fishing and hunting rights which cases consistently find that the control and regulation of fishing is of prime importance to Indian tribes. Under long-established canons of construction concerning congressional enactments regarding Indian rights, P. L. 83-280 must be construed in a light favorable to them. *Antoine v. State, supra; Morton v. Ruiz*, 94 S.Ct. 1055 (1974); *see also Seminole Nation v. United States*, 316 U.S. 286 (1942). Thus, the statute must be read to deny to the state any jurisdiction over the control, licensing or regulation of fishing on a reservation.

4. *The exclusive tribal right to regulate on-reservation fishing activities is consistent with the doctrines of sovereignty and tribal self-government and with subsequent acts of Congress dealing with Indian self-determination.*

This Court has always recognized the quasi-sovereign status of Indian tribes, wherein all powers including those of self-government rest with the tribe until those powers are abrogated by Congress. *United States v. Mazurie*,

419 U.S. 544, 557 (1974) Relying on *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the court in *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959) held:

> . . .[I]ndian nations and tribes are distinct political entities, having territorial boundaries within which their authority is exclusive; that within their boundaries they have their own government, laws, and courts, and are not subject to the laws of the state in which they are located or to the laws of the United States, except where Federal laws are made applicable to them by congressional enactment, and that Federal courts are without jurisdiction unless jurisdiction is expressly conferred by congressional enactment.

272 F.2d at 133. *See also Arizona ex rel. Merrill v. Tuttle*, 413 F.2d 683 (9th Cir. 1969). In *Williams v. Lee*, 358 U.S. 217 (1959), this Court reiterated the well-established rule:

> The cases in this Court have consistently guarded the authority of Indian governments over their reservations. . . . If this power is to be taken from them, it is for Congress to do it.

358 U.S. at 223.[13]

Congress not only accepts the concepts of tribal quasi-sovereignty and the power to regulate on-reservation activity, it has recently acted to strengthen and reaffirm those concepts. The Indian Civil Rights Act of 1968, 25 U.S.C. §1321-1326, the Indian Self-Determination Act, 25 U.S.C. §450 (f) *et seq.* (1975), and the Indian Financing Act of 1974, 25 U.S.C. §1451 *et seq.*, are all recent enactments of Congress which tend to either limit the assumption of state jurisdiction over on-reservation activities or to facili-

13. *Williams v. Lee*, held that states could not assume jurisdiction on reservations when such assumption would interfere with the right of tribes to make their own laws and be governed by them. It is elementary, that the assumption of jurisdiction here requested by the State of Washington would wipe out the ability of the Puyallup Tribe to enact any law dealing with the most vital on-reservation activity—fishing. Such a result would be diametrically in opposition to the result reached by this Court in *Williams v. Lee*.

tate tribal expansion of jurisdiction over on-reservation activities.

Despite the overwhelming case law cited above, the State Court still found that the ability of the State to regulate on-reservation activity "at the most simply not precluded by the existence of the Puyallup Reservation, and at the least an open question after *Matts v. Arnett*, 412 U.S. 481, 485 (1962)," 86 Wn.2d at 668. The State Court's reliance on *Matts v. Arnett* is totally misplaced. The sole question before the court in *Matts* was whether or not the Klamath Indian Reservation continued to exist. This Court specifically declined to rule on whether or not in the unique situation which existed on the Klamath Reservation state jurisdiction could be applied thereon. On remand, the California Supreme Court held that state jurisdiction did *not* extend onto the Klamath Reservation for purposes of regulating reservation fishing activities. *Arnett v. 5 Gillnets*, 121 Cal. Rptr. 906 (1975), *cert. denied*, 47 L. Ed. 2d 557 (1976)

Alternatively, the court below reasoned, "The Supreme Court's clear mandate in *Puyallup II* would seem to include on-reservation state jurisdiction". 86 Wn.2d at 669. Of course, such an implied abrogation of treaty rights is inconsistent with the basic principles of treaty interpretation consistently announced by this Court and certainly cannot be assumed by the remand in *Puyallup II*.

To hold that the State of Washington has jurisdiction to regulate on-reservation fishing would be a denial not only of the express language of Public Law 280, but in direct contravention of the clear intent of Congress expressed in subsequent acts in which the continued sovereign power of tribes was not only recognized, but encouraged. The State's bid to assume jurisdiction in the present case must be denied.

5. *The tribe's right to regulate on-reservation fishing is not diminished merely because of an incidental off-reservation effect, nor is this Court empowered to make policy decisions to deal with such effects*

As noted above, the Washington State Supreme Court found the power to regulate on-reservation fishing in part as a necessary incident to its off-reservation regulation. The court below found that this Court's remand in *Puyallup II* would seem to imply on-reservation jurisdiction. 86 Wn.2d 664, 668-69.[14]

Possible off-reservation adverse effects resulting from exercise of on-reservation guarantees do not constitute grounds to abrogate treaty rights. *Winters v. United States*, 207 U.S. 654 (1908); *Arizona v. California*, 373 U.S. 546 (1962). This Court in *Arizona and Winters* premised its holding on the proposition that the treaties reserved sufficient water to fulfill the purposes for which the reservations were established. In the cases of *Winters* and *Arizona*, water was needed to irrigate the reservations.

The maintenance of a fishery on the reservations in *United States v. Washington* is as important to the realization of the initial purpose of those reservations as the recognition of an on-reservation water right was to the reservations in the Southwest. To accept the State's proposition that it may control on-reservation fishing merely because such activity may have some effect off-reservation, would be to deny to

14. This proposition must be premised upon the baseless assumption that Indian tribes are either incapable or unwilling to regulate their own fisheries. As noted in Section 6, *infra*, Indian tribes not only have shown a willingness to regulate fishing in the past, but are now under court orders to improve and maintain that regulatory ability and have so complied.

the tribes the ability to realize the benefits of their reservations, and impliedly work in abrogation of the treaties involved.

The abrogation of treaty rights, the limitation thereof, or the extension of the plenary power of the United States to tribes rests exclusively with the United States Congress, and any changes should be made by it. *Lonewolf v. Hitchcock*, 187 U.S. 553 (1903).

> Plenary authority over the tribal relations of Indians has been exercised by Congress from the beginning and the power has always been deemed a political one not subject to be controlled by the judicial department of the government.

Lonewolf v. Hitchcock, supra, at 556. *See also Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959).

6. *Indian tribes in Washington have sufficient authority and ability to regulate on-reservation fishing for conservation purposes*

The authority and continuing ability of Indian tribes to manage and control their own fisheries has been recently affirmed in *United States v. Washington*[15]. The Petitioner herein, amici treaty tribes, and the State of Washington were parties. The case represented a major and united effort of tribes of Western Washington and the United States Government to force the State of Washington to recognize and respect the tribes' off-reservation treaty right to fish. The case dealt exclusively with the relationship between the State and tribes in the off-reservation harvest and management of anadromous fish. However, the principles and findings enunciated in *United States v. Washington* are dispositive of the ancillary objections raised by the State and other intervenors in the present case.

15. *See: United States v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974); *see also, Colville v. State*, 412 F.Supp. 651 (E.D. Wash. 1976).

The District Court found that Indian people have consistently maintained a high respect for the resource.

> With a single possible exception testified to by a highly interested witness (FF 102) and not otherwise substantiated, notwithstanding three years of exhaustive trial preparation, neither Game nor Fisheries has discovered and produced any credible evidence showing any instance remote or recent, when a definitely identifiable member of any Plaintiff Tribe exercised his off-reservation treaty rights by any conduct or means detrimental to the perpetuation of any species of anadromous fish.
>
> Unfortunately insinuations, hearsay and rumors to the contrary, usually but not always instigated anonymously, have been and still are rampant in Western Washington. Indeed, the near total absence of substantial evidence to support these apparent falsehoods was a considerable surprise to this Court.

384 F.Supp. 312, 338, n. 26.

The District Court's findings is consistent with the *facts* found in the present case. The State's own witnesses described the tribe's steelhead fishery as rather orderly with closed periods being honored "very carefully." (St. 1103-04.)

For the first time in the Indian fishing controversy, *United States v. Washington* opened up avenues of communication between the State and tribes. The District Court required all tribes including the Puyallup Tribe to provide tribal fish catch reports, indicating both on and off reservation treaty harvests, whenever requested by Fisheries or Game. (*See United States v. Washington*, Order of Oct. 8, 1974, Appendix "A" herein.) These reports facilitate the State's ability to establish escapement goals and are used

for other reasonable and necesary conservation purposes. All tribes are complying with this provision. Similarly in post-decision orders the district court has ordered that the tribes convey to the Departments of Fisheries and Game initial pre-season estimates of their on-reservation harvests, ceremonial harvests, and subsistence harvests.[16] In addition, tribes are barred from engaging in any off-reservation fishing unless specific and biologically sound regulations have been adopted by each tribe. 384 F.Supp. 312, 340 (1974). Quite clearly fishing is no longer being conducted by tribes in a vacuum. The State of Washington is receiving more information now than it has ever received in the past. With an opening of off-reservation fishing after *United States v. Washington*, the impact of on-reservation fishing has been diminishing. At the same time, knowledge of on-reservation fishing activities has been increasing as tribes continue to comply with Judge Boldt's orders.

As a result of *United States v. Washington* Indian tribes have increased their management capabilities to a point that they often exceed the State's abilities. Tribal biologists have been employed to meet Court-ordered requirements that the tribes file specific regulations and take responsibility for the management of their fisheries.[17] Indian tribes have bound together to form the Northwest Indian Fisheries Commission, an all Indian organization made up of all case area tribes designed to facilitate and coordinate fishing activities of all tribal members.[18] The District Court has called on this organization numerous times and has referred to it countless times in post-decision orders. One of the District Courts primary orders was to establish the

16. See, Appendix "A" herein.
17. See Appendix "B".
18. See Footnote 3, *supra*.

Fisheries Advisory Board. (Order of Dec. 17, 1976, App. "D" herein) The Northwest Indian Fisheries Commission is responsible for selecting the Indian delegate to this arbitration and consultation board. Indian tribes in furtherance of the management responsibilities ennunciated in *United States v. Washington* have undertaken numerous projects designed to enhance the resource not only for their own benefit, but for the benefit of all persons.[19] Quite clearly it is an unfair statement to indicate that tribes are not capable and willing to manage their own resource. They have acted as responsibly as the State in assuring that their activities do not infringe upon the preservation of the resource.

The court below fails to recognize the nature of tribal governments. Like any government, Indian governments have power over their citizens (members) and most importantly over their territory.

19. A list of tribal government fish plants is attached as Appendix "C". This list was submitted as evidence by affidavit in a recent proceeding in *United States v. Washington*. Many of the tribes have substantial enhancement and artificial propagation projects and facilities. Amicus Lummi Tribe, for example, operates a multimillion dollar aquaculture project on the reservation. This project includes a fish hatchery, oyster hatchery, sea pond, outside oyster growing operation, joint fishing ventures and processing. The hatchery has an incubation capacity of approximately five and one-half million eggs a year and operates with a normal crew of 13 in addition to the management. Amicus Makah Tribe is currently constructing a seven and one-half million dollar hatchery on the Makah Indian Reservation under the auspices of the U.S. Fish and Wildlife Service. This hatchery will produce several million young fish each year for planting in all streams throughout Western Washington. The considerable amount of land necessary for the operation and other support services are being supplied by the tribal government at tribal expense. Amicus Quinault Tribe has, for some time, operated fisheries enhancement programs, including the production of sockeye, chum and steelhead and currently operates the Quinault National Fish Hatchery in cooperation with the federal government. The Squaxin Island, Lower Elwha, Port Gamble and Suquamish Indian tribes are also engaged in extensive on-reservation enhancement projects. These are but just a few of the examples of substantial enhancement and planting programs carried on by treaty tribes in Western Washington.

Tribal governments do not consider the power to regulate on-reservation fishing as merely theoretical. They are expending hundreds of thousands of dollars to develop and regulate their on-reservation fisheries. As noted above, several tribes have developed fish hatcheries or other fish rearing facilities. (See footnote 19) The development of these on-reservation fisheries is consistent with the purpose for which the reservations were originally established.

State regulation of on-reservation fishing would destroy the ability of Indian tribes to gain economic self-sufficiency through the development of on-reservation fisheries. Such limitation of the treaty right reserved by the tribes would make Indian reservations — originally established to be homes for Indian tribes—mere useless parcels of land to be lived upon but not developed. The principles of tribal self-government, which ensure the continuation of Indian nations, their governments and way of life would be rendered nugatory.

B. Issues suggested for decision by respondents are not ripe for adjudication and this case should be limited to the single issue presented for review

Both the respondent State of Washington and respondent Northwest Steelheaders have sought to greatly expand the issues presented by the petitioners' request for a writ of certiorari. (*See* State Response, p. 1, 2, 24, n. 14, and Northwest Steelheaders' Response, p. 2-3.) Petitioners sought review of but one issue: The State's authority to regulate Indian fishing on an Indian reservation. Respondent's invite this Court to consider two additional and quite distinct issues: An interpretation of the Indian treaties with the federal government; and a determination to the

effect that Indian fishermen do not have a treaty right to fish for so-called artificially-propagated salmon.

Respondent State of Washington raised these same issues in its cross petition for certiorari. This Court without reservation dismissed the State's cross petition as being not timely. This Court's action left for review *only* that single issue raised by petitioner.

Having lost their attempt to raise those issues directly before this Court, respondents now seek to raise them collaterally, thereby inviting this Court to make major decisions interpreting Indian treaties without the benefit of any substantial record. The record presented by the State related to *one* river—the Puyallup River, and one rather insignificant anadromous fish run—the steelhead run. From this limited record the State suggests that this Court has sufficient facts in which to determine the treaty rights relating to every river and all tribes of Western Washington.

The limited record in the instant case must be contrasted to that found in *United States v. Washington*. That case involves 21 tribes in Western Washington and all five of the treaties which were negotiated with the United States government and the tribes.[20] Judge Boldt has either decided (treaty allocation) or is in the process of deciding (hatchery entitlement) the same issues improperly raised by the respondents before this Court. The State seeks a determination that the treaty of the Puyallup Tribe and therefore the treaties of all tribes of Western Washington does not permit an allocation of harvestable fish between treaty and non-treaty fishermen. This very issue was decided in *United States v. Washington* and is *res judicata* as to the State of Washington. *City of Tacoma v. Taxpayers*

20. *See* footnote 2 *supra*.

of Tacoma, 357 U.S. 320 (1958). Judge Boldt determined that treaty and non-treaty fishermen were each entitled to the opportunity to harvest up to 50% of the harvestable fish. 384 F.Supp. at 343. This allocation was affirmed by the Ninth Circuit (520 F.2d 676 (9th Cir. 1975) and certiorari was denied by this Court.[21]

The fact that this issue of treaty allocation has been fully adjudicated is sufficient grounds for this Court to dispose of the matter. The scant record presented to this Court is added incentive to avoid the treaty interpretation issue.

This Court has long recognized that the interpretation of Indian treaties is a complex task. The Court has allowed and required a complete examination of the factual circumstances that surrounded the negotiation of Indian treaties. This Court has established rules of construction that require that treaties be interpreted in the way understood by the Indian people, resolving ambiguities therein in a manner most favorable to the Indian people. Quite obviously, the most important ingredient to treaty interpretation is such historical information.

The present case presents no evidence upon which to base an adequate interpretation of what the treaty must have meant to the Indian signers. Nowhere in the record does one find any historic or ethnohistoric reports dealing with the circumstances surrounding the treaty signing. Contrasted to this, the record in *United States v. Washington* contained lengthy anthropological and ethnohistorical reports submitted by an anthropologist whose evidence was found by the trial court to be "exceptionally well re-

21. It seems incongruous for the State now to deny an allocation between treaty and non-treaty fishermen, as the Department of Fisheries proposed in *United States v. Washington*, an allocation of one-third of all fish to treaty fishermen.

searched and reported."[22] 384 F.Supp. at 350. Proper adjudication of the meaning of the Treaty of Medicine Creek requires thorough investigation and inquiry into all of these matters and the participation of the other parties to that Treaty who are not now before this Court.[23]

The invitation to this Court that it adjudicate whether and to what extent Indian tribes are entitled to take a treaty share of so-called artificially-propagated fish in this case should be rejected. Again of primary concern to amici is the suggestion that this Court can decide such an issue that will affect fishing rights of numerous tribes pursuant to five treaties or a record dealing with only one river, one tribe. Amici submit that rivers cannot be evaluated without an understanding of how they fit into the entire water system. The situation in the Puyallup River is not unrelated to the situation, for example, on the Green River. Unfortunately, the record in this case is limited only to the Puyallup River. In fact, any attempt by petitioners to show the interrelationship between the Puyallup and other rivers was rejected by the trial court below.

The issue of the treaty right and hatchery fish is now pending before Judge Boldt in Phase II of *United States v. Washington*. Judge Boldt in his initial decision in *United States v. Washington* held that the Indian treaty right extended to fish artificially propagated. 384 F.Supp. 312, 411. This part of the decision was not dealt with on appeal by the State, although it might well have been. This basic

22. Evidence before the court in *United States v. Washington* involved the minutes of the Treaty negotiations, the instructions to the negotiators from Governor Stevens, evidence of contemporaneous writings concerning the situation at Treaty times, the testimony of nearly 50 witnesses and more than 350 exhibits. 384 F.Supp. at 348.

23. The Muckleshoot, Nisqually, and Squaxin Island tribes, amici herein, are also all parties to the Treaty of Medicine Creek.

ruling has been affirmed by the District Court in two subsequent major orders.[24] These subsequent orders were made necessary because the State of Washington insisted upon violating the decision in *United States v. Washington* and unilaterally imposing upon *all* tribes the holding in *Puyallup III* which was specifically limited to the Puyallup Tribe and River.

At the time that the Court ruled that hatchery reared fish were to be considered part of the treaty share, *Puyallup III* had *not* been decided, but the Court was mindful that the State of Washington might raise the issue before the state courts in *Puyallup III*. Therefore, consistent with the principles of comity, the Court deferred implementation of its prior order as it pertained to the Puyallup Tribe and River giving the state court the opportunity to comport its findings with the already set out federal determination.

The initial ruling by the District Court that hatchery fish were to be included within the treaty entitlement coupled with its intention to defer implementation of that portion of its ruling as it applied to the Puyallup Tribe and River has produced a confusing situation, especially in light of the opposite holding by the state courts. The Court has allowed all parties in *United States v. Washington* to present additional evidence on the subject during the Phase II portion of *United States v. Washington*. All plaintiff tribes, including the Puyallup Tribe, and the State of Washington, including the Department of Game, have indicated their intention to litigate the hatchery issue in *United States v. Washington*. The District Court by order dated December 15, 1976 has set January 9, 1978, as the date when this issue will be finally litigated. The parties in *United States*

24. Order of Oct. 22, 1975; Order of Aug. 13, 1976.

v. Washington are now engaged in extensive discovery on this very point, and are looking forward to trial. The determination to be made by the District Court on this issue will deal with not only the Puyallup River, but with all rivers and all tribes within Western Washington. The District Court will be in the position to evaluate the evidence and study its interrelation. Quite obviously, that Court would be in a better position to make an initial ruling on the treaty entitlement to hatchery fish based upon the record to be developed in *United States v. Washington—Phase II*. This Court should not go beyond its grant of certiorari and deal with the hatchery issue, especially in light of the pending case now before the United States District Court for the Western District of Washington.

C. The decision of the court below, misapplies and ignores fundamental tenets of Indian law, is based on incorrect factual assumptions, improper analogies, and adopts a rationale thoroughly discredited by previous rulings of this Court.

1. *The court below ignores and misapplies fundamental tenets of Indian treaty construction.*

In reaching its decision, the Supreme Court of Washington thought it necessary to interpret the Treaty of Medicine Creek. (10 Stat. 1132) In so doing, the court listed a series of cases in which this Court has set down the principles and rules of construction required for the interpretation of Indian treaties. 86 Wn.2d 664, 672-74.

However, it appears that this recital was merely a gesture. The remainder of the lower court's opinion evinces no inclination to follow such rules. Indeed the court could not have applied such rules because the record is seriously deficient as to what the signers of the Medicine Creek

Treaty might have meant by the language used in that treaty.[25]

Rather, the state court attempts to derive meaning from Article 3 of the Treaty in two ways. First, it refers to dictionaries as to the meanings of the phrase "in common with," but makes no attempt to match those definitions to the historical and anthropological context in which they were used or to the canons of construction.

Secondly, the court seems to reason that the promises in the treaty were premised on the condition that there was an "inexhaustible supply of fish" and that there was no contemplation that there would have to be conservation requirements necessary to preserve the species. ". . . [T]he fish were there for the taking." *Department of Game, supra,* at p. 676. How the court proceeds from these statements to its conclusion does not appear. Nor are the statements based on fact.[26]

25. Of course, the state court did not have before it other signatories to the Treaty of Medicine Creek, including several *Amici* herein, and including the United States (which is not a *party* to *Puyallup v. Department of Game,* but participates as *Amicus.*)

26. The district court in *United States v. Washington,* on a record substantially more complete and extensive than that here found no such thing. There the court found:

> However, the Indians' harvest of fish was subject to the vagaries of nature which occasionally imperiled their food supply and caused near starvation. The amounts of fish that could be harvested were particularly affected by run size fluctuations caused by natural conditions and water conditions occurring at the time the fish were running, . . .

(Finding of Fact #5, 384 F.Supp. 312 at 351) The Court further found that concern over the continuing return of salmon was central to the religious and cultural beliefs of the tribes.

> The first salmon ceremony, which with local differences in detail was general through most of the area, was essentially a religious right to ensure the continued return of salmon. The symbolic acts, attitudes of respect and reverence, and concern for the salmon reflected a ritualistic conception of the interdependence and relatedness of all living things which was a dominant feature of the native Indian world view. Religious attitudes and rights ensured that salmon were never wantonly wasted and that water pollution was not permitted during the salmon season.

(Finding of Fact #6, 384 F.Supp. 312 at 351.

The statement that Article 3 of the Treaty of Medicine Creek is "clear and unambiguous in its face", (*Puyallup III,* 86 Wn.2d at 674) is not well taken. The meaning of the fishing provisions of the Medicine Creek Treaty and others in the Washington Territory have been litigated since the beginning of this century. *United States v. Winans,* 198 U.S. 371 (1905). What is clear is that treaty interpretation must proceed on the basis of full historical and anthropological evidence and proper application of canons of treaty construction, something which has not been done here. The mere recitation of the canons of treaty interpretation without application to available facts bearing upon the intentions of the parties should not be approved. Unfortunately, this Court has often had to remind the court below of the proper application of Indian treaty canons of interpretation. *(See Antoine v. Washington,* 420 U.S. 194 (1975).

2. *The "equal footing" theory of Puyallup III*

In its decision the State Supreme Court resurrects the argument that the treaties were intended to do no more than guarantee Indians equal rights with the non-Indian citizens. 86 Wn.2d 664, 676. Such reasoning has been consistently rejected by this Court. In *United States v. Winans* (198 U.S. 371 (1905)), the Court reversed a ruling of a lower federal court which had held that the Indians were on an "equal footing" with citizens of the United States and that they had thus acquired no rights but what any

inhabitant of the territory or state would have. *United States v. Winans* at 380. This Court rejected that reasoning noting that to adopt such reasoning would be to hold that the Indians had "... acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more." *United States v. Winans, supra,* at 380.

That reasoning was also used by the State Supreme Court in *State v. Antoine,* 82 Wn.2d 440, 511 P.2d 1351 (1973). There the state court held that an agreement with the Colville Tribes containing language similar to the Treaty of Medicine Creek only allowed hunting on ceded land "as long as the white man and other Indians were allowed to hunt there . . . .," in other words, on an "equal footing" with non-Indians. *(State v. Antoine,* 511 P.2d at 1357-58). Again the reasoning was rejected by this Court, the Court noting that the language ". . . does not support that interpretation or affect the supremacy clause's preclusion of qualifying state regulation." *Antoine v. Washington,* 424 U.S. 194, 206 (1975).

In this case, the state court reasons that the treaty should be interpreted to support the view that the intent of the parties ". . . as is clear from the provision's language, was to preserve equal treatment for the Indians." *Department of Game v. Puyallup* at 675.[27]

27. The state court held that "at the time of the treaty, equal footing with citizens of the territory was very significant. When the treaty was written, Indians were not citizens . . . ." 86 Wn.2d at 679. Therefore, it was important to guarantee them fishing rights in common with other citizens. How this guaranteed the Indians some important right is not clear. In fact, it appears that Washington did not restrict commercial fishing to citizens until 1899, (1899 Wash. Laws, Ch. 117, §2), and the State of Washington still allows non-citizens to fish. RCW 77.32.151 and

The District Court in *United States v. Washington* (384 F.Supp. 312 (1974)) made a contrary finding, well supported by an extensive record not found in this case. In *United States v. Washington,* the District Court held as follows:

> There is nothing in the written records of the Treaty Councils or other Council discussions with the Indians to indicate that the Indians were told that their existing fishing activities or tribal control over them would in any way be restricted or impaired by the treaty. The most that could be implied from the treaty context is that the Indians may have been told or understood that non-Indians would be allowed to take fish at the Indian fishing locations along with the Indians.

(Finding of Fact 26, *United States v. Washington,* 384 F.Supp. 312 at 357.

3. *The incorrect analogy between modern salmonoid propagation methods and treaty era cultivation of shellfish*

The state court finds that the Treaty of Medicine Creek does not reserve a right to fish on artificially-propagated fish stocks. 86 Wn.2d 664, 682. The court holds that the exclusion of Indians from shellfish beds staked and "cultivated" by non-Indians indicated that the "impact" of the Treaty was to "distinguish natural resources from artificial sources." *Supra,* at 682.

This holding violates standard Indian treaty interpretation. Certainly by specifically excluding "artificial" shellfish but not mentioning "artificial" or "hatchery" fish, no exclusion of such fish was intended. Additionally, the Court's decision on this issue is based on no facts or record what-

161. If the State Court means that the treaty guaranteed the Indians the rights to fish at off-reservation places, and if in fact all inhabitants of the territory had that right anyway, then the treaty granted or reserved nothing to the Indians. This reasoning has, of course, been consistently rejected *United States v. Winans,* 189 U.S. 371 at 380.

ever. The Court cites nothing to support the contention that the propagation of artificial salmonoid fishes (of which steelhead are one) was unknown at at the time. Standard fisheries texts indicate otherwise.[28]

It may be true that the artificial propagation of the anadromous steelhead trout was not being attempted in Washington Territory at the time of the Medicine Creek Treaty, but neither was the artificial propagation of shellfish—if we define artificial propagation to mean, as does it in salmonoid hatchery production; reproduction, multiplication or increase in numbers using unnatural or artificial methods.[29]

The shellfish fishery in Washington Territory at the time of the Treaty of Medicine Creek was only involved in harvesting of wild or natural oysters.[30] "Cultivated" beds as used in the Article 3 can only have meant the privately staked areas of tidelands where wild oysters, harvested

28. Successful experimentation with the artificial propagation of salmonoid species began in 14th century Europe. In 1863 a hatchery was established for the production of salmonid fishes in Germany. The first publicly owned salmonid hatchery was established in France in 1852. An American researcher developed a new and more effective method for artificial fertilization of the eggs of salmonoid fishes in 1856. In 1857 an American researcher published a text on the artificial propagation of salmonoid fishes which reflected years of research. The first American salmon hatchery was constructed in New York in 1864. Davis, H.S., *Culture and Diseases in Game Fishes*, University of California Press, 1967; pp. 5 through 8.

29. See Ingersoll, Ernest; "The Oyster, Clam, Mussel, and Abolone Industries"; Part XX of Vol. II of Section V of: *The Fisheries and Fish Industries of the United States*, by George Brown Goode, U.S. Commission on Fish and Fisheries, 1887, Washington, D.C. pp. 505-626.

30. Sayce, Clyde, Shellfish biologist for the Washington State Department of Fisheries, *History of the Oyster Industry in Washington State;* in "Terrastrial and Ecological Studies of the Northwest," Eastern Washington State College Press, Cheney, Washington, publication due, March, 1977.

from the natural beds, were transplanted or staked.[31] This removal had little to do with multiplication or reproduction as can be readily seen from the fact that the great natural oyster beds of the Territory were depleted almost to extinction by the late 19th Century.[32]

Removal of wild oysters to the "cultivated" beds had nothing to do with reproduction. Rather, such removal made the "culled" wild oysters more convenient to harvest; established property rights to the wild oysters; and provided a place where the wild oysters might grow to a larger size.[33]

To attempt to analogize the word "cultivated" as used in 1855 (and applicable only to shellfish) to the modern artificial propagation of anadromous salmonoid fishes (and without reference to the *reasons* for such propagation) is serious error. Amici urge this Court to allow these issues to be tried in Phase II of *United States v. Washington, supra,* where an appropriate record may be developed.[34]

D. The argument that planting of steelhead maintains the natural run on the Puyallup River.

At least two Justices below appear to have voted to sustain the court's ruling as a result of misunderstanding a State exhibit.

31. Sayce, Clyde, *supra, op cit.*

32. Little, A. C., "10th and 11th Annual Reports of the Washington State Fish Commissioner," 1901; pp. 28-29, 60-63.

33. *See also* Cooper, James G., "Pacific Coast Oyster," Overland Monthly, Vol. XXIII, No. 138, June 1894, pp. 648-660; Townsend, Charles H., "Observations Respecting the Oyster Resources and Oyster Fisheries of the Pacific Coast," Report of the Commissioner for 1889 to 1891, U.S. Commission on Fish and Fisheries, 1893, Vol. XVII, pp. 343-372.

34. In Phrase II of *United States v. Washington*, the treaty tribes have alleged that artificial propagation has been made necessary to replace natural run fish destroyed by State action or in action in derogation of the treaties.

In his concurring opinion, (86 Wn.2d 664, 690) Justice Rosellini holds that the planting of steelhead in the Puyallup River maintains the natural run in that river and that, therefore, any apportionment of the run is "legally incorrect." (86 Wn.2d at 694). In order to support his theory, he publishes a table (labeled Respondent's Exhibit 74-2) in the text of his opinion, (*supra*, p. 695) as proof that without large plantings the return of steelhead to the Puyallup River would be minimal. (*supra*, p. 696.) This table, however, supports no such conclusion and is highly suspect as "scientific" data. The data, in fact, appears to support just the opposite conclusion. That is, as the number of plants increases, the catch decreases.[35] The conclusion drawn from the data is therefore erroneous.

Secondly, the data itself, is suspect. As a first inquiry, some attempt should have been made to go behind the data to determine how accurate it was.[36] Further, the table lacks several factors important to making any conclusions about the status of the Puyallup steelhead run. First, little data with regard to the catch size before planting began is shown. Twenty-six years of "plant" data but only two years of "non-plant" is not enough for an appropriate comparison. Second, no figures on the total run are present. (The "catch" figures certainly do not indicate total run as large numbers of fish escape both the commercial and sport fish-

35. For example, a catch in 1964 of 15,942 fish correlates to a "plant" of 65,000 fish. Yet a catch in 1969 of 11,602 fish (4,340 *fewer* fish) correlates to a "plant" of 67,000 fish. (2,000 fish *greater* than in 1964.) It is not clear how a "massive infusion" of hatchery fish has supported the run.

36. This data used on the table is suspect because of the probably inaccurate methods used for obtaining it. The "sports" catch is obtained through the use of non-mandatory punch card reporting and the Indian catch is obtained through a few fish buyers.

eries in the river and some steelhead are caught in marine commercial fisheries.) Finally, no information with regard to the numbers of fishermen, sport or commercial fishing on the Puyallup steelhead run is presented. "Catch" figures may simply be a reflection of the "effort" (*i.e.*, low effort, low catch; high effort, high catch) and not the abundance of steelhead present. In short, such "data" is a poor basis for decision on such important matters.

IV

CONCLUSION

This litigation originally involved off-reservation treaty rights of the Puyallup Tribe. Upon remand, the state court below, transmuted the case into one which expanded and extended state jurisdiction to control Indian fishing on an Indian reservation. This action seriously threatens the continued operation of fishing activities presently under the sole control of numerous tribal governments, both treaty and non-treaty, in the State of Washington.

Treaties and agreements between the tribes and the United States setting up reservations guaranteed exclusive fishing rights and control to the Indian tribal governments. To abrogate or impair this tribal government control would be to seriously undermine the nature and extent of the promises originally made to the Indian tribes. If such an extension of state authority is to be made it is for Congress to do so. No grant of such authority to the State presently appears in case law or legislative acts. Public Law 83-280 (18 U.S.C. §1162) contains an express disclaimer against state interference with Indian tribal government control of fishing on the reservation.

In responses to the petitioner's request for a writ of certorari, the State of Washington and other parties have urged issues which should not be decided in the present context. They have invited the Court to reinterpret the Treaty of Medicine Creek and, therefore, quite possibly all Indian treaties in Western Washington. To do so without the presence and participation of the treaty tribes and the United States government would undoubtedly yield an incorrect result. These matters have already been extensively litigated in the federal action of the *United States v. Washington, supra*. The decisions there are *res judicata* as against the respondent State of Washington.

The Court is also invited to decide whether treaty tribes should have a share of so-called artificially propagated fish. This request is being made on a wholly inadequate record which does not take into account the reasons it became necessary to begin to artificially propagate fish nor the extensive propagation efforts of the tribes themselves. This matter is currently being fully litigated in the United States District Court for the Western District of Washington where all the complex facts involving the reduction in natural runs, the building up of artificial runs, the relative contributions of state, federal and tribal governments and other factors can be considered. The District Court is already engaged in substantial fact finding on this issue and

the matter is set for trial on January 9, 1978. This Court should reject any invitation to prematurely decide these issues.[37]

Respectfully submitted,

ZIONTZ, PIRTLE, MORISSET,
ERNSTOFF & CHESTNUT
By MASON D. MORISSET
Counsel for Amici Curiae

ALAN C. STAY
MICHAEL TAYLOR
Counsel for Amici Curiae

January 24, 1977

37. A just result in the present controversy would obtain if the state court's decision were vacated and all further proceedings in the present cause stayed pending completion of the trial in "Phase II" of *United States v. Washington* and the completion of current appeals to the Ninth Circuit regarding the propriety of federal court injunctions against Indian tribes for on-reservation fishing. The District Court for the Western District of Washington has exerted this authority on several occasions in the continuing case of *United States v. Washington*. Thus the State of Washington is not without a remedy if it feels it absolutely necessary to request a closure or reduction of on-reservation fishing. While amici do not necessarily admit the propriety of this action, nevertheless at the present time it exists as a viable alternative to state court action.

APPENDIX A

No. 9213

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, *et al.*, *Plaintiffs*, v. STATE OF WASHINGTON, *et al.*, *Defendants*	Filed 10-18-74 ORDER FOR PROGRAM TO IMPLEMENT INTERIM PLAN

IT IS HEREBY ORDERED that the following program is approved as an initial program to implement the Interim Plan approved by this court on March 22, 1974.

It is recognized that this program is subject to modification and further refinement as additional information and further experience become available. The parties will continue to develop such information and experience and will consult frequently with each other on general and specific problems or conditions in an effort to achieve more completely and as rapidly as possible full compliance with the spirit and objectives of the Orders of March 22, 1974. Any modifications or refinements agreed to by the affected parties shall become effective upon filing with the court without further action or approval of the court unless such further action is specified therein. Any party may submit requests for other modifications or refinements for approval or other appropriate Order by the court.

Tribes having qualified for self-regulation are not bound by the particulars of this program, other than as directed by the terms of Final Decision No. I and the Injunction entered pursuant thereto.

IMPLEMENTING PROGRAM

A. Guideline Principles for Regulating Fisheries.

Guideline Principles for Regulating Fisheries pursuant to Paragraph 2 of the Interim Plan and Stay Order shall be

filed with the court no later than October 4, 1974. If agreement has not been reached to those principles for regulating fisheries, they shall be submitted to the Expert and Master for determination of those to be implemented.

B. Exchange of Information Preliminary to Regulation.

Data required to be furnished by the state agencies under Paragraph 17 and 18 of the Injunction and Paragraph 7 of the Interim Plan and Stay Order and data required to be furnished by the tribes under Paragraph 17 of the Injunction and Paragraph 7 of the Interim Plan and Stay Order shall be furnished at the earliest practical time after such data becomes available, but no later than the following schedule:

1. At least sixty (60) days prior to entry of a run into the first fishery subject to state control, run, size predictions, numbers of harvestable fish set pursuant to Paragraph 17 of the Injunction and information concerning run size, timing and condition requested by the tribes pursuant to Paragraph 18 of the Injunction and Paragraph 7 of the Interim Plan and Stay Order shall be furnished by the state agencies.

Until such time as predictions of steelhead run size are possible, Game shall determine the harvestable portion of the run in the best manner practicable, after consulting with the plaintiffs to receive their suggestions. Such predictions relating to harvestable numbers of fish shall be subject to review if the tribes believe there is better information from another source. If the parties cannot agree on the best source, the court shall make a determination through the Master in consultation with its Expert advisor. All predictions of harvestable numbers shall be further subject to review during the fishing season as additional information is obtained.

2. At least fifty (50) days prior to the entry of a run into the first fishery subject to state control, the tribes shall furnish information concerning their anticipated fishing activity as requested by the state under Paragraph 17 of the Injunction.

3. At least forty-two (42) days before a proposed opening of fishing, the state agencies and tribes shall exchange proposed off-reservation fishing regulations affecting the particular fishery.

4. At least twenty-one (21) days before a proposed opening, regulations shall be adopted and filed pursuant to Paragraph 1 of the Interim Plan and Stay Order; *provided* that the time periods under Paragraphs 3 and 4 above shall not be applicable to regulations filed prior to September 15, 1974; *provided further* that for such latter regulations filed after the date of this order at least seven (7) days notice of such regulation shall be given before a fishery is opened; and *provided further* that emergency regulations are enforceable upon filing them with the court and service upon the other parties affected of a copy of such regulations and a statement of the facts and circumstances of the emergency on which the regulation is based. Any party may respond and seek immediate review. Requests for emergency consideration by the court will be given priority and determined rapidly.

The 1974 Puget Sound coho fishery shall be apportioned according to the principles in the Interim Plan. It is recognized that there is not sufficient time available to adhere to the schedule of information exchange specified in the plan. Therefore, on Monday, September 30, 1974 at 9:30 a.m. Fisheries and the plaintiffs shall meet with the Master in an attempt to reach agreement on the numbers of harvestable fish to be divided.

C. Limitation on Harvest.

Whenever such closure or curtailment will (1) increase the opportunity of the other fishery (i.e., non-Indian or Indian, respectively) to take more of the harvestable portion of such run, and (2) not result in overescapement for such run, the Department of Fisheries will close or curtail the non-Indian fisheries on any run of salmon when the non-Indian catches reach or are expected to reach 50% of the harvestable portion of that run. That Department may likewise close or curtail Indian off-reservation commercial fisheries on said run whenever those fisheries have taken 50% of the harvestable portion of said run. The De-

partment of Game may close or curtail the Indian off-reservation steelhead commercial fisheries or the non-Indian sport fisheries, respectively, on any river system steelhead run whenever such fisheries have taken 50% of the harvestable portion of said run. For purposes of this Paragraph the harvestable portion of the run shall be the number determined by the Department of Fisheries for salmon or the Department of Game for steelhead and supplied in accordance with Paragraph B.1 above.

D. Identification of Indian-Caught Steelhead.

The parties agree that it is desirable to develop mechanisms for assuring that steelhead other than those lawfully taken by Indian treaty fishermen do not enter commerce contrary to state law. The tribes and the Indian Fisheries Commission shall coordinate efforts with the Department of Game to develop a plan for meeting the objectives of preventing unlawfully caught non-Indian fish from entering commerce and providing a means for catch reporting and shall submit their joint recommendation to the Court by November 1, 1974, for the Court's consideration and/or official tribal and Department of Game action.

E. Catch Data.

1. Commerical catch reports shall be made by non-state licensed Indian fish buyers on forms (fish tickets) provided by the state agencies, except for the Quinault Indian catch which may be made on tribally issued fish tickets. Indian fish buyers will submit a copy of such fish tickets daily to the Northwest Fisheries Program Office of the U.S. Fish and Wildlife Service which shall communicate to the applicable state agency by a copy of the fish ticket or otherwise, data concerning the total catch by species, area of catch and tribe before the close of business of the day on which such reports are received. Copies of fish tickets reporting Indian catch purchased by state-licensed fish buyers shall be made available to the Northwest Fisheries Program Office of the U.S. Fish and Wildlife Service by the state agencies within one day of the date that such reports are received.

2. For each run of fish the state agencies shall provide the Northwest Fisheries Program Office of the U.S. Fish

and Wildlife Service or to the tribes summaries of the non-Indian commercial catch no less than weekly and sport catch biweekly.

F. Determination of Tribal Treaty Status and Fishing Areas.

The defendants shall not, with respect to any Indian tribe or group which has not specifically been determined by this court to be entitled to an interim or permanent basis to be recognized as a treaty tribe, treat any off-reservation taking of fish from stocks of the case area by such tribe or group as treaty fishing in making any allocation of fish to treaty Indians or in restricting the fishing of tribes recognized by this court as treaty tribes pursuant to the Decree and Orders in this case, without first obtaining the concurrence of the tribes involved.

2. In order to be entitled to exercise its off-reservation treaty fishing rights, any tribe allowed to intervene in this case to assert its claim of treaty fishing rights shall, prior to any attempt to exercise such rights, present prima facie evidence and arguments supporting its claim to treaty status and tribal organizations upon which the court may make a preliminary determination as to whether such tribe is to be dealt with as a treaty tribe entitled to fish at specified locations pursuant to the Interim Plan and Stay Order pending final determination of said tribe's status after a full hearing; *provided*, however, that nothing in this paragraph shall preclude members of such tribes from fishing off-reservation in conformity with state regulations applicable to anadromous fish, to the same extent as non-treaty right fishermen. Any court order permitting such interim fishing may impose such special conditions as it deems appropriate and shall set a schedule for presentation of evidence, briefing, and a full hearing on such issues and determination by the court. Any party disputing a tribe's claim of treaty entitlement or the recognition of specific usual and accustomed places shall cooperate in allowing the matter of final determination of such matters to be made promptly and as rapidly as the court calendar and the interests of justice permit.

G. Non-Anadromous Fish and Shellfish.

1. In order to be entitled to exercise off-reservation treaty fishing rights to non-anadromous fish and shellfish, any tribe party to this case shall, prior to any attempt to exercise such rights, present prima facie evidence and arguments supporting its claim to treaty entitlements to such non-anadromous fish and shellfish upon which the court may make a preliminary determination as to the tribe's entitlement to such species, pending final determination of tribal treaty right entitlement to non-anadromous fish and shellfish; *provided*, however, that nothing in this paragraph shall preclude members of such tribes from fishing off-reservation in conformity with state regulations applicable to non-anadromous fish and shellfish, to the same extent as non-treaty right fishermen. Following such preliminary determination, off-reservation fishing areas shall be opened only to the extent that tribes so established to have entitlement to non-anadromous fish and shellfish adopt and file with the court and defendants tribal regulations for the non-anadromous fishing activities of their members specifying the areas to be opened to fishing by tribal members. Any party disputing a tribe's claim of treaty entitlement or the recognition of specific usual and accustomed places shall cooperate in allowing the matter of final determination of such matters to be made promptly and as rapidly as the court calendar and the interests of justice permit.

2. The biologists of the defendants and biologists for the tribe shall meet to formulate general principles to be utilized as guidelines to be flexibly applied in the adoption of specific fishing regulations applicable to particular species of non-anadromous fish and shellfish. Such guideline principles shall be filed with the court no later than November 1, 1974.

3. The parties, or any of them, may invoke the continuing jurisdiction of this court in order to determine:

a. The procedure and/or method for adopting management principles with respect to any particular species of non-anadromous fish or shellfish;

b. The species taken at treaty times, where (usual and accustomed grounds), and by what tribes (who are entitled to exercise treaty entitlement);

c. Questions of allocation between plaintiff tribes and non-Indian fishermen of the harvestable portion of the specific species on non-anadromous fish or shellfish;

d. A timetable for the taking of evidence regarding any particular non-anadromous species or shellfish; and

e. Such other matters as the court may deem appropriate.

H. Expiration of Interim Program.

This Order for Program to Implement Interim Plan shall continue in full force and effect until further order of this court.

DATED this 8th day of October, 1974.

GEORGE BOLDT
/s/ GEORGE BOLDT
Sr. United States District Judge

APPENDIX B

Biologists who work for Indian tribes and organizations or are available for assistance in the *U.S. v. Washington* case area—as of August 6, 1976.

Biologist	*Affiliation*
Larry Gilbertson	Quinault Tribe
Phil Rogers	Quinault Tribe
Terry Wright	Quinault Tribe
Larry Lestelle	Quinault Tribe
Larry Feldman	Quinault Tribe
Bill Grubb	Quileute Tribe
Rick Klinge	Hoh Tribe
Rich Mattson	Hoh Tribe
Arnold Elofson	Lower Elwha Tribe
Larry Rutter	Port Gamble Tribe
Phil Mundy	Point No Point Treaty Council
Rick Harris	Squaxin Island Tribe
Steve Wilson	Nisqually Tribe
Paul Svoboda	Puyallup Tribe
John Kerwin	Puyallup Tribe
Cliff Bengston	Tulalip Tribe
Rick Granstrand	Skagit System
Richard Cooper	Nooksack Tribe
Chris Weller	Small Tribes Organization Of Western Washington
Ron Costello	Small Tribes Organization Of Western Washington
Lars Mobrand	Small Tribes Organization Of Western Washington
Dick Navarre	Northwest Fisheries Program
Paul Wares	Northwest Fisheries Program
Fred Olney	Northwest Fisheries Program

Biologist	*Affiliation*
Walt Ambrogetti	Northwest Fisheries Program
Roger Wolcott	Northwest Fisheries Program
Tom Payne	Northwest Fisheries Program
John Meyer	Northwest Fisheries Program
Jim Heckman	Northwest Indian Fisheries Commission
Mike Grayum	Northwest Indian Fisheries Commission
Michele Anderson	Northwest Indian Fisheries Commission
Gary Graves	Northwest Indian Fisheries Commission

APPENDIX C

FISH PLANTS 1976

Tribe	*Number of Fish*	*Species*	*Place Planted*
Squaxin Island	300,000	Coho	Peal Passage
	50,000	Chum	Educational Hatchery
Tulalip	120,000	Fall Chinook	
	329,000	Chinook	
	500,016	Coho	
	402,500	Chinook	
	200,000	Chum	Mission Creek
	10,500	Rainbow Trout	Tulalip Creek Reservoir
	30,000	Steelhead	
Upper Skagit (Sauk-Suiattle)	100,000	Coho	Old Sauk-Channel
	150,000	Coho	Illabot Creek
	300,000	Coho	Newhalem Ponds
	100,000	Coho	Upper Dam Creek
	150,000	Coho	Upper Jackman Creek
	50,000	Coho	Davis Slough
	100,000	Coho	Finney Creek
	100,000	Coho	Bacon Creek
	100,000	Coho	Clear Creek
Makah	250,000	Coho	Sooes River
	250,000	Coho	Waatch River
	2,500	Rainbow Trout	Hobuck Lake
	1,000,000	Chum	Sooes River
Hoh	150,000	Coho	Braden Creek
Lower Elwha	2,000	Rainbow Trout	Beach Lake
Lummi	250,000	Steelhead	Tribal Hatchery
	1,000,000	Chum	Tribal Hatchery
	2,000,000	Coho	Tribal Hatchery

Tribe	*Number of Fish*	*Species*	*Place Planted*
Muckleshoot	250,000	Coho	White River
	1,500	Rainbow Trout	Beaver Ponds
	350,000	Chum	Green River
	300,000	Chum	Quilcene
Port Gamble	300,000	Chum	Tribal Hatchery
	100,000	Coho	
Puyallup	250,000	Chum	Swan Creek
Suquamish	50,000	Chum	Tribal Hatchery
Nisqually	500,000	Coho	
	35,000	Chum	
Steilacoom	50,000	Coho	
Quinault	1,000	Rainbow Trout	Camp Chitwin Lake
	3,000,000	Chum	Cook Creek
	1,200,000	Coho	Cook Creek
	500,000	Fall Chinook	Cook Creek
	500,000	Fall Chinook	Cook Creek
	150,000	Steelhead	Cook Creek
	50,000	Coho	Moclips River
	150,000	Coho	Humptulips River
	100,000	Coho	Queets River (Harlow Creek)
	100,000	Coho	Raft River
	20,000	Coho	Taholah School

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FISH PLANTS
1975

Tribe	*Number of Fish*	*Species*	*Place Planted*
Lummi	57,000	Steelhead	S. F. Nooksack
	93,000	Coho	S. F. Nooksack
	3,000	Coho	S. F. Nooksack
	550,000	Chum	Kwina Slough
	13,072	Fall Chinook	S. F. Nooksack
	216,067	Fall Chinook	No Mark
	9,700	Coho	Sea Pond
	7,000	Coho	Sea Pond
	81,900	Coho	Sea Pond
	72,000	Coho	Sea Pond
	14,182	Coho	CWT Adipose
	3,085	Coho	Sea Pond
	27,810	Coho	Sea Pond
	71,800	Coho	Sea Pond
	225,000	Chum	Circular Raceway Research Facility
	29,400	Coho	Sea Pond
	25,000	Coho	Circular Raceway Research Facility
	25,040	Coho	Sea Pond
	33,787	Coho	Sea Pond
Tulalip	750,000	Silver	
	350,000	Chinook	
Squaxin	650,000	Coho	Peal Passage
	50,000	Coho	Peal Passage
	250,000	Chum	Peal Passage

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COOPERATIVE FISH PLANTS WITH U.S. FISH AND WILDLIFE SERVICE
1975

Tribe	*Number of Fish*	*Species*	*Place Planted*
Hoh	250,684	Coho	Braden Creek
	79,316	Coho	Hoh River
Lower Elwha	2,000	Rainbow Trout	Beach Lake
Lummi	1,496,580	Coho	Tribal Hatchery
	1,000,000	Chum	Tribal Hatchery
	1,470,000	Coho	Tribal Hatchery
Muckleshoot	1,000	Rainbow Trout	Beaver Ponds
Makah	250,000	Coho	Waatch River
	250,470	Coho	Sooes River
	1,500,000	Chum	Sooes River
	2,500	Rainbow Trout	Hobuck Lake
Port Gamble	100,000	Chum	Little Boston Creek
Quinault	1,000	Rainbow Trout	Camp Chitwin Lake
	327,650	Fall Chinook	Cook Creek
	315,600	Fall Chinook	Cook Creek
	1,693,973	Chum	Cook Creek
	400,000	Coho	Cook Creek
	639,029	Coho	Cook Creek
	232,368	Coho	Humptulips River
	94,032	Coho	Harlow Creek
	100,000	Coho	Raft River
	80,000	Coho	Moclips River
	100,000	Coho	Copalis River
	15,000	Coho	Taholah School

COOPERATIVE FISH PLANTS WITH U.S. FISH AND WILDLIFE SERVICE 1975

Tribe	*Number of Fish*	*Species*	*Place Planted*
Quinault	250,000	Coho	Quinault Reservation
	48,500	Steelhead	Cook Creek
	451,040	Steelhead	Quinault Resource Development Program
Squaxin Island	250,000	Chum	Educational Hatchery
Tualip	3,225	Rainbow Trout	Ross Lake
	10,500	Rainbow Trout	Tulalip Creek Reservoir
	200,170	Chum	Mission Creek

APPENDIX D

UNITED STATES DISRICT COURT WESTERN DISTRICT OF WASHINGTON AT TACOMA

UNITED STATES OF AMERICA, et al., *Plaintiffs,* v. STATE OF WASHINGTON, et al., *Defendants.*	CIVIL NO. 9213 Order Re: Rules of Procedure for Fisheries Advisory Board And Resolution of Disputes

This Order shall govern resolution of certain disputes and provide procedural rules for the functioning of the Fisheries Advisory Board.

This Order supersedes any inconsistent provisions of the "Order Establishing Fisheries Advisory Board" October 28, 1975.

1. *Composition of the Board*

1.1 The Fisheries Advisory Board shall be composed of two members, selected as follows:

(a) One member selected by the State of Washington and the defendant agencies.

(b) One member selected by the treaty Indian tribes.

1.2 There shall be in addition a non-voting Chairman whose function shall be to convene meetings, act as moderator, and perform such other duties as are provided herein, or agreed to by the parties, or directed by the court. Dr. Richard Whitney, the court's technical advisor, shall continue to serve as Chairman.

1.3 The State and the tribes are responsible for selecting their representatives and shall promptly inform the chairman of any changes or substitutes appointed by either the State or the tribes. The representatives shall serve as the

members of the Advisory Board until the chairman is notified by either the Northwest Indian Fisheries Commission or the State of the selection of new or alternate representatives.

2. *Jurisdiction and Authority of the Board*

2.1 *Submission to Board.* The Board shall consider only those matters relating to the fishery resource that are submitted to it by the court or any party to this order.

2.2 *Committee Reports.* The Board members, upon agreement shall have the authority to appoint temporary committees to study particular matters submitted to the Board for which more information is needed. A committee shall have only those powers delegated to it by the Board members and shall report back to the Board by a date certain. Committee reports are not binding on any party or Board member and need not be filed with the court but shall be given to any party upon request. The Board may adopt such other and further procedures as are acceptable to the parties.

3. *Board Procedures*

3.1 The Board shall convene at the request of a member or any party or the court. The chairman shall give to all parties, amici, the Northwest Indian Fish Commission, and the members of the Board such notice of a Board meeting as is practicable, taking into account the urgency of the matters to be considered. Provided, however, that any party directly affected by the matters to be considered shall be given actual notice within such time as is reasonable in the then existing circumstances. Any party may object to the jurisdiction of the Board to hear any matter referred to it. In such a case the Board shall take no action until the court has determined that the Board has jurisdiction to hear the matter.

3.2 The Chairman shall preside over meetings of the Board. The Chairman shall briefly state the matter to be considered and then call upon the Board member or party referring the matter to the Board to make a presentation concerning it. In any proceeding, an affected party may be represented by the person of the party's choice. Any party

may call witnesses to give testimony in the nature of evidence before the Board. No person shall have a right to give testimony before the Board unless called as a witness by an affected party, a Board member or the Chairman. Board members may participate in questioning witnesses and the representative of the parties. Proceedings shall not be under oath but any portion thereof may be recorded at the request of any party. The Chairman may make whatever rulings deemed reasonably necessary in terms of limiting the number of participants and the length of time allowed to each participant.

To aid in an orderly procedure, any party requesting a meeting of the Board shall attempt to advise the Chairman as soon as possible as to the nature of the party's presentation, including the number of participants, time needed, etc.

3.3 The Board chairman or member designated by a majority of the Board shall prepare a written report of the Board's proceedings after each meeting which shall be filed with the court and served on all parties and amici. The report shall be limited to a summary of what transpired at a Board meeting, and shall include whenever applicable an exact statement of any agreements reached by the participants.

3.4 The court's technical advisor shall, upon the request of the court, or any party, report to the court and all parties, his analysis of the matters discussed in the Advisory Board meeting and recommendations, if any. Whenever practicable said analysis and recommendations shall be provided to all parties and the court in writing prior to a hearing.

4. *The following procedures are adopted for the promulgation and enforcement of State emergency conservation regulations.*

4.1 The State shall retain the responsibility for conservation closures.

4.2 This section is intended to further define paragraph 19 of the Injunction issued in *U.S. v. Washington*, 384 F.Supp. 312 (1974), which requires: "a statement of facts

and circumstances of the emergency on which the regulation is based."

4.3 No State conservation regulation which would close or limit an off-reservation treaty fishery which is open pursuant to tribal regulation shall be enforceable unless adopted pursuant to the requirements of this section: *provided,* the State may apply directly to the court for enforcement of an emergency conservation regulation that is adopted without following the procedures specified herein.

Any State emergency conservation regulation which complies with the procedures of this section, or is specifically approved by the court, may be enforced by the State.

4.4 As soon as the State has reason to believe that it may become necessary to enact and enforce an emergency conservation regulation affecting off-reservation treaty fishing, it shall give notice either directly or through the Chairman of the Fisheries Advisory Board to all affected tribes of the potential emergency specifying the data upon which the State bases its opinion that an emergency regulation may be necessary. The State shall continue to provide updated data to all affected tribes and to the Chairman of the Fisheries Advisory Board.

4.4.1 Each tribe that desires to be governed by the notice procedures and requirements contained in § 4.5 and 4.6 shall contribute to a central 24-hour telephone service to receive notice by the State of any proposed emergency conservation closure.

4.5 At least forty-eight (48) hours prior to the effective date of any State emergency conservation regulation which would affect off-reservation treaty fishing, the State shall:

4.5.1 Request that the court's Advisory Board convene to study the need for such regulation.

4.5.2 Serve on all affected tribes copies of any emergency regulation along with a statement of the basis of the alleged emergency and supporting data that would justify the proposed emergency conservation regulation.

4.6 The court's Advisory Board shall convene if desired

by any party at least twenty-four (24) hours prior to the effective date of the proposed State emergency conservation regulation and shall consider the propriety of the proposed regulation(s).

4.6.1. The State shall present to the Board all data supporting the State's proposed regulation with an explanation of the relevancy of such data.

4.6.2 Any affected party may present additional data or explanation thereof intended to rebut or support the State's presentation.

4.6.3 Whenever possible, the court's Advisory Board shall convene so as to facilitate oral presentation of all relevant data.

4.7 Reports of any Board recommendation shall be prepared consistent with paragraph 3.3 of these procedures.

4.8 Any affected party may seek immediate court review. Request for emergency consideration by the court will be given priority.

5. This Order does not apply to self-regulating tribes except where made applicable to them by Final Decision No. 1 and previous Orders of this court; provided, that by agreement between any self-regulating tribe and a State defendant, the procedures set out in this Order may be invoked to provide a hearing before the Board on any issue within the scope of this Order.

6. These rules and guidelines shall apply until further order of the court or until modified by agreement of all parties. If after a substantial period of time, barring any emergency, this Order proves unsatisfactory, any party may apply to the court for modification of the order. DATED THIS 17th day of December, 1976.

/s/ GEORGE H. BOLDT
Sr. United States District Judge